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Religion, Politics, Race, and Ethnicity: The Range and Limits of Voir Dire

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Religion, Politics, Race, and Ethnicity: The Range and Limits of Voir Dire

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INTRODUCTION

Every weekday, in courtrooms around the country, hundreds of judges and lawyers ask prospective jurors thousands of questions. Their ostensible purpose is to determine whether to exercise a challenge for cause or a peremptory challenge.

Often, lawyers are aided by jury consultants who have "profiled" jurors. They suggest categories of people who should be selected for or "deselected" from the jury. So lawyers typically want the greatest latitude to question prospective jurors. As Clarence Darrow said:

> [E]verything pertaining to the prospective juror needs to be questioned and weighed: his nationality, his business, religion, politics, social standing, family ties, friends, habits of life and thought[, and] the books and newspapers he likes and reads .... Involved in it all is ... above all, his business associates, residence and origin.[1]

But does the law really permit all that? To what extent must prospective jurors reveal their views of religion, politics, race, and national origin?

These are not idle questions to the practicing lawyer. On September 18, 2001, a case was called in which "nearly a quarter of potential jurors said

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[1] Clarence Darrow, *Attorney for the Defense*, ESQUIRE MAG., May 1936, *reprinted in* CLARENCE DARROW, VERDICTS OUT OF COURT 315 (Arthur Weinberg & Lila Weinberg eds., Ivan R. Dee 1989) (1963).

they might be biased against the Egyptian-born defendant following last Tuesday's terrorist attacks in New York and Washington, D.C."[2] Clearly, voir dire mattered in that case. But what are the rules for the conduct of voir dire in such sensitive areas? What should they be?

Although the right to trial by jury is preserved in every jurisdiction in the country,[3] the rules regarding jury selection vary widely.[4] Thus, it is not possible to "state the law" regarding voir dire in a way that is universally applicable. There are two propositions, however, that seem to be in effect in most jurisdictions. Because these propositions are sometimes in tension, they frame a key problem of voir dire.

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[2] Donna Huffaker, *In Capital Case, Potential Jurors Admit Prejudice: Judge Delays Trial of Egyptian Born Man Dismisses Jury Pool*, L.A. DAILY J., Sept. 18, 2001, at 1; *accord* Harriet Chiang, *Terrorist Attacks Transform Courtroom Psyche of Jurors*, S.F. CHRON., Oct. 11, 2001, at A-3.

[3] Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968) ("[E]very American State . . . uses the jury extensively . . . ."); Irvin v. Dowd, 366 U.S. 717, 721–22 (1961) ("[E]very State has constitutionally provided trial by jury."). The right to trial by jury has long historic roots in America. One of the grievances stated in the Declaration of Independence is that the King has "depriv[ed] us in many cases, of the benefits of Trial by Jury." *See* THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776). When the Constitution of 1789 failed to provide for the right to trial by jury in civil cases, the Antifederalists made that a theme of their opposition to ratification. *See* THE ANTIFEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 173 (Eldridge Gerry's Objections to Draft Constitution); *id.* at 175 (George Mason's Objections to Draft Constitution); *id.* at 198 ("John DeWitt" Essay II "To the Free Citizens of the Commonwealth of Massachusetts"); *id.* at 200, 202, 212 (Patrick Henry, Speeches to the Virginia Ratifying Convention); *id.* at 228 ("Centinel" Number I "To the Freemen of Pennsylvania"); *id.* at 249–50 ("Address of the Pennsylvania Minority Convention of Pennsylvania to their Constituents"); *id.* at 266 (Letters from the Federal Farmer, Oct. 9, 1787) (Ralph Ketcham ed., Mentor Books 1986) (1981). Of course, this objection was met by passage of the Sixth and Seventh Amendments, which were sent by Congress to the states in September 1789 and became effective on December 15, 1791. The Sixth Amendment is made applicable to the states by incorporation into the Fourteenth Amendment. Taylor v. Louisiana, 419 U.S. 522, 526 (1975); Williams v. Florida, 399 U.S. 78, 86 (1970); *Duncan*, 391 U.S. at 145; The Seventh Amendment is not. City of Monterey v. Del Monte Dunes, Ltd., 526 U.S. 687, 718–19 (1999); Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 432 (1996); Curtis v. Loether, 415 U.S. 189, 192 n.6 (1974).

[4] Citations to the law regarding jury selection in the fifty states can be found in ANN FAGAN GINGER, JURY SELECTION IN CIVIL AND CRIMINAL TRIALS § 4.53, at 174 (1984) and ARNE WERCHICK, MODERN CIVIL JURY SELECTION 317–71 (2d ed. 1993).

The first general rule is that trial courts are granted considerable discretion to control the way in which prospective jurors are questioned. "Voir dire 'is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion.' "[5] This includes what topics should be covered and what questions may be asked.[6]

The second general rule is that a party has a right to a fair and impartial jury, and, therefore to sufficient voir dire to determine whether a juror should be challenged for cause. In most jurisdictions, that right extends to inquiries deciding whether to exercise a peremptory challenge.[7]

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[5] Ristaino v. Ross, 424 U.S. 589, 594–95 (1976) (quoting Connors v. United States, 158 U.S. 408, 413 (1895)); *accord* Mu'Min v. Virginia, 500 U.S. 415, 427 (1991); Edmondson v. Leesburg Concrete, 500 U.S. 614, 623 (1991) ("The trial judge exercises substantial control over *voir dire* in the federal system."); Rosales-Lopez v. United States, 451 U.S. 182, 188–89 (1981) (plurality opinion); United States v. Greer, 968 F.2d 433, 435 (5th Cir. 1992); People v. Sanders, 905 P.2d 420 (Cal. 1995); Robinson v. State, 297 N.E.2d 409, 412 (Ind. 1973); State v. Morris, 691 So. 2d 792, 800 (La. Ct. App. 1997); State v. Manley, 255 A.2d 193 (N.J. 1969); State v. Jones, 491 S.E.2d 641, 647 (N.C. 1997); Strube v. State, 739 P.2d 1013, 1015 (Okla. Crim. App. 1987) ("The manner and extent of examination of prospective jurors rests in the sound discretion of the trial judge . . . ."); State v. Smart, 299 S.E.2d 686, 690 (S.C. 1982).

[6] *Mu'Min*, 500 U.S. at 424; Real v. Hogan, 828 F.2d 58, 62 (1st Cir. 1987) ("[T]he district court has broad discretion as to the manner in which it conducts the voir dire and the inquiries it chooses to make, subject only to the essential demands of fairness . . . . It need not . . . pose every voir dire question requested by a litigant. It is more than enough if the court covers the substance of the appropriate areas of concern by framing its own questions in its own words."); United States v. Giese, 597 F.2d 1170, 1182–83 (9th Cir. 1979) ("A district court has considerable discretion to accept or reject proposed questions, . . . and as long as it conducts an adequate voir dire, its rejection of a defendant's specific questions is not error."); Hamling v. United States, 418 U.S. 87, 139–40 (1974); *accord* Herman v. Johnson, 98 F.3d 171, 174 (5th Cir. 1996); United States v. Lancaster, 96 F.3d 734, 738 (4th Cir. 1996); People v. Saiz, 660 P.2d 2, 4 (Colo. Ct. App. 1982); Bishop v. Crowther, 415 N.E.2d 599, 607–08 (Ill. App. Ct. 1980); State v. Burr, 461 S.E.2d 602, 613 (N.C. 1995). On the other hand, there are cases that require inquiry into racial prejudice and pretrial publicity. The former is discussed later in this article. *See infra* notes 390–88 and accompanying text; *see also Mu'Min*, 500 U.S. at 425–27 (holding that an inquiry into racial prejudice must be made following the Court's decision in *Aldridge v. United States*, 283 U.S. 308, 311).

[7] This is so in federal court. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 143–44 (1994) ("*Voir dire* provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently."); *Mu'Min*, 500 U.S. at 431 ("*Voir dire* examination serves the dual

In a sense, the trial court's discretion is limited by the party's right to

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purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges."); United States v. Whitt, 718 F.2d 1494, 1497 (10th Cir. 1983) ("Without an adequate foundation [laid by voir dire], counsel cannot exercise sensitive and intelligent peremptory challenges . . . ."); Ham v. South Carolina, 409 U.S. 524, 532 (1973) (Marshall, J., concurring in part and dissenting in part) ("Of course, the right to challenge has little meaning if it is unaccompanied by the right to ask relevant questions on voir dire upon which the challenge for cause can be predicated."); Brown v. United States, 338 F.2d 543, 545 (D.C. Cir. 1964) (holding that there is reversible error when a judge fails to inquire as to potential jurors' biases because it, "might have supplied defense counsel . . . with relevant and useful information for exercising peremptory challenges or challenges for cause.").

See AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO JUROR USE AND MANAGEMENT 58 (1993) ("Voir dire examination should be limited to matters relevant to determining whether to remove a juror for cause and to exercising peremptory challenges.").

State courts also recognize a party's right to voir dire. *See, e.g.*, Gasiorowski v. Homer, 365 N.E.2d 43, 45 (Ill. App. Ct. 1977) ("It is well established that limitation of voir dire questioning may constitute reversible error where its effect is to deny a party a fair opportunity to probe an important area of potential bias or prejudice among prospective jurors."); *Morris*, 691 So. 2d at 803 ("An accused in a criminal case is constitutionally entitled to a full and complete voir dire examination.... Voir dire is designed to discover grounds for challenges for cause and to secure information for an intelligent exercise of peremptory challenges."); *Strube*, 739 P.2d at 1016 ("In the examination of jurors, wide latitude must be given the parties to enable them to obtain a jury free of outside influence, bias or personal interest."); State v. Patterson, 351 S.E.2d 853, 854 (S.C. 1986) (recognizing that a South Carolina statute permits voir dire questioning on bias and prejudice); Maddux v. Texas, 862 S.W.2d 590, 593 n.1 (Tex. Crim. App. 1993) (Miller, J., concurring) ("The right to ask questions of panel members is included in the right to counsel and is of constitutional magnitude in this State."). Often there is a statutory basis for this. *See, e.g.*, CONN. GEN. STAT. § 54-82f (2001); GA. CODE ANN. § 15-12-133 (2001); ME. REV. STAT. ANN. tit. 15, § 1258-A (West 2003).

This is not universally true. For example, in California criminal cases, voir dire may be conducted "only in aid of the exercise of challenges for cause," not peremptories. *See* CAL. CIVIL PROC. CODE. § 223.

Note, too, that peremptory challenges are not constitutionally required, so the Supreme Court has been unwilling to treat many complaints about peremptory challenges as violations of a constitutional right. *Mu'Min*, 500 U.S. at 424–25; *see* Ross v. Oklahoma, 487 U.S. 81, 88 (1988). *But cf.* Batson v. Kentucky, 476 U.S. 79 (1986) (holding a constitutional violation occurs when individuals are excluded from the jury based on their race) and its progeny.

inquiry sufficient to inform a challenge. The party's right to ask such questions is limited by the trial judge's very broad discretion.

How then are these to be reconciled in a government of laws? What rules emerge from the cases to make voir dire something more than simply a clash of wills between aggressive counsel and a trial judge trying to set limits? And how, in reconciling these principles, does the law consider whether jurors must reveal matters they may ordinarily consider private?

Few cases have attempted to answer this in the abstract. The academic literature rarely addresses these questions comprehensively. Some authors have focused on the value of peremptory challenges and, as a consequence, have urged wide latitude to question prospective jurors.[8] Other authors have focused more on the competing concern—that of a juror's privacy, and urged more narrow questioning.[9] Still others take something of a tighter focus, essentially reviewing a recent case or short line of cases.[10] The latter

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[8] See, for example, the seminal article by Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545 (1975); *see also* Richard J. Crawford & Daniel W. Patterson, *Exploring and Expanding Voir Dire Boundaries: A Note to Judges and Trial Lawyers*, 20 AM. J. TRIAL ADVOC. 645, 662 (1997) ("Opening up the questioning process is likely to enhance the quality of juror screening without doing violence to the fair trial ideal."); Barat S. McClain, Note, Turner's *Acceptance of Limited Voir Dire Renders* Batson's *Equal Protection a Hollow Promise*, 65 CHI.-KENT L. REV. 273, 306 (1989) ("The Supreme Court should . . . issu[e] an opinion in the near future which acknowledges the essential linkage of a thorough voir dire to the non-discriminatory exercise of peremptory challenges.") (1989). One article attempts to state rules of general applicability. *See* Jay M. Spears, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 STAN. L. REV. 1493, 1494 (1975).

[9] *See, e.g.*, Michael R. Glover, *The Right to Privacy of Prospective Jurors During Voir Dire*, 70 CAL. L. REV. 708 (1982); Case Comment, *Voir Dire Limitations as a Means of Protecting Jurors' Safety and Privacy:* United States v. Barnes, 93 HARV. L. REV. 782 (1980).

[10] *See, e.g.*, Nancy Lewis Alvarez, *Racial Bias and the Right to an Impartial Jury: A Standard for Allowing Voir Dire Inquiry*, 33 HASTINGS L.J. 959 (1982); Charlene S. Bazarian, *Individual Voir Dire Examination of Potential Jurors in Interracial Murder Cases*—Commonwealth v. Young, 22 SUFFOLK U.L. REV. 895 (1988); John T. Bibb, *Voir Dire: What Constitutes An Impermissible Attempt to Commit a Prospective Juror to a Particular Result*, 48 BAYLOR L. REV. 857 (1996); Jeffrey M. Gaba, *Voir Dire of Jurors: Constitutional Limits to the Right of Inquiry Into Prejudice*, 48 U. COLO. L. REV. 525 (1977); Timothy M. Gebhart, Press-Enterprise Co. v. Superior Court*: Is There a Juror Right to Privacy that Justifies Closing Voir Dire in Criminal Trials?*, 30 S.D. L. REV.134 (1984);

are often more helpful, for it is useful to examine particular lines of cases if one is to discover neutral principles that govern (or should govern) voir dire. But before one reviews the cases, a caution is in order.

I. TWO CAVEATS

A. Standard of Review

Trial courts are reversed on only limited grounds for permitting or excluding a voir dire question. Most commonly, the standard is abuse of discretion.[11] Sometimes, however, a party claims his or her constitutional right to a fair trial was violated. Then, the appellate court must determine whether the party was deprived of some constitutional protection.[12] In other cases, an appellant claims the conduct in voir dire constituted a deprivation of the effective assistance of counsel.[13] Then, the federal standard is not whether the trial court abused its discretion, but whether trial counsel's

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Michael P. Malak, *First Amendment—Guarantee of Public Access to Voir Dire*, 75 J. CRIM. L. & CRIMINOLOGY 583 (1984); S.J. Meltzer, United States v. Greer*: Is a Racial Inquiry Necessary for an Adequate Voir Dire*, 67 TUL. L. REV. 1700 (1993); Dean A. Stowers, Note, *Juror Bias Undiscovered During Voir Dire: Legal Standards for Reviewing Claims of a Denial of the Constitutional Right to an Impartial Jury*, 39 DRAKE L. REV. 201 (1989-90). For an attempt to canvass the law of one state, North Dakota, see Michael J. Ahlen, *Voir Dire: What Can I Ask and What Can I Say*, 72 N.D. L. REV. 631 (1996). An excellent survey of the law regarding sexual orientation and voir dire is Paul R. Lynd, *Juror Sexual Orientation: The Fair Cross-Section Requirement, Privacy, Challenges for Cause, and Peremptories*, 46 UCLA L. REV. 231 (1998); *see also* Vanessa H. Eisemann, *Striking a Balance of Fairness: Sexual Orientation and Voir Dire*, 13 YALE J.L. & FEMINISM 1, 2 (2001) (arguing that "sexual orientation should be treated the same as race, religion, ethnicity and gender for the purposes of voir dire").

[11] *See* cases cited *supra* note 6; *see also* Hernandez v. New York, 500 U.S. 352, 364–69 (1991) (plurality opinion) (discussing standard of review of *Batson* challenges); Cordero v. United States, 456 A.2d 837, 841 (D.C. 1983) (using an abuse of discretion standard for reviewing trial court's voir dire examination).

[12] Ristaino v. Ross, 424 U.S. 589, 593–94 (1976); *Ham*, 409 U.S. at 527.

[13] *See, e.g.*, Green v. Johnson, 160 F.3d 1029, 1035–36 (5th Cir. 1998); Anderson v. Collins, 18 F.3d 1208, 1216–19 (5th Cir. 1994); Buxton v. Collins, 925 F.2d 816, 826 (5th Cir. 1991). At least one defendant has used state law instead of the Constitution to claim ineffective assistance of counsel. Commonwealth v. Griffin, 644 A.2d 1167, 1173 (Pa. 1994) (claiming ineffective counsel under Pennsylvania's Post Conviction Hearing Act).

performance was deficient and prejudicial.[14] In still other cases, a party seeks a certificate of appealability under the Antiterrorist and Effective Death Penalty Act of 1996.[15] Such cases require a substantial showing of the denial of a constitutional right.[16]

These standards of review present high hurdles for an appellant. Thus, decisions affirming trial courts are not necessarily instructive. They should not be ignored, however, for there is much to be learned from studying how trial courts have exercised their discretion. Cases in which trial courts have permitted (or excluded) certain lines of inquiry may be useful precedent to a practitioner. In addition, they provide a basis for understanding what a trial judge should consider when deciding how to exercise his discretion.

Although the standard of review is difficult to meet, there are cases in which an appellate court has reversed a trial court based on the conduct of voir dire.[17] These cases are particularly instructive, for they help mark the outer limits of proper inquiry.

B. The Context of the Case

When reading voir dire cases, one must also be alert to the context in which each arose. It is worth bearing in mind the following distinctions.

1. *Federal Versus State Cases*

Each state has its own laws governing jury selection.[18] When attempting to determine the law, it is sometimes the case that an idiosyncratic

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[14] *See* Strickland v. Washington, 466 U.S. 668, 687 (1984). This requires a party to establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and that "the deficient performance prejudiced the defense." *Id.*; *see, e.g.*, Green v. Johnson, 160 F.3d 1029, 1035 (5th Cir. 1998) (holding that the defendant did not prove that his counsel's actions prejudiced him).

[15] 28 U.S.C. § 2253(c)(1) (2003).

[16] *See, e.g.*, Herman v. Johnson, 98 F.3d 171, 173 (5th Cir. 1996). *Herman* discusses whether the standard for obtaining a certificate of appealability governs an application for a certificate of probable cause that was pending at the time the Antiterrorist and Effective Death Penalty Act of 1996 was passed. The difference between those two standards may affect how a court analyzes a particular voir dire issue. *Id.*

[17] *See, e.g.*, *Ham*, 409 U.S. at 524; Morford v. United States, 339 U.S. 258, 259 (1950) (per curiam); United States v. Dellinger, 472 F.2d 340, 409 (7th Cir. 1972).

[18] Mirroring the Federal Rules, law governing jury selection is found in Rule 47 of the Rules of Court of many states: Alaska, Arizona, Colorado, Delaware,

statute or rule bears on the matter.[19] Thus, cases from one jurisdiction cannot simply be cited in another. Sometimes they are on point, sometimes not.

2. *Federal Appellate Cases*

When reading federal appellate cases, one must note whether trial was held in a state or federal court. If the trial was held in state court, the federal court is limited to determining whether the decision below accords with the United States Constitution.[20] If the trial was in a United States District Court, then the appellate court has greater latitude, for it may exercise its "supervisory" authority over lower courts.[21]

3. *Civil Versus Criminal Cases*

It may matter whether the case at issue was civil or criminal. For example, California has separate rules governing voir dire in civil and criminal cases.[22] Similarly, the Supreme Court gave careful consideration whether to extend *Batson*[23] (a criminal case) to civil cases.[24]

District of Columbia, Idaho, Indiana, Kentucky, Maine, Massachusetts, Minnesota, Mississippi, Montana, North Dakota, Ohio, Utah, Vermont, Washington, West Virginia, and Wyoming. In many of those states, however, there are additional statutory provisions governing jury selection. *See, e.g.*, ARK. CODE ANN. § 16-33-202 to 203 (Michie 2003); HAW. REV. STAT. § 635-27 to 29 (2003); MISS. CODE ANN § 13-5-69 (2003); WASH. REV. CODE § 4.44.210 (2003). Other states have unique statutory or civil rule provisions. *See, e.g.*, CAL. R. OF CT., 228; CAL. CODE CIV. PROC. CODE. §§ 205, 222.5, 225–234 (2003); FLA. R. CIV. PROC. 1.431; GA CODE ANN. § 15-12-133 (2002); GA. SUPER. CT. R. 11; ILL. CODE CIV. PROC. § 2-1105.1; ILL. SUP. CT. R. 234; IOWA R. CIV. PROC. 187; MO. REV. ANN. STAT. § 494.480 (2003); OKLA. STAT. CIV. PROC. § 575.1 (2003); OKLA. R. DIST. CT., 6.

[19] *See, e.g.*, Cowan v. State, 275 S.E.2d 665 (Ga. 1981); Strube v. State, 739 P.2d 1013 (Okla. Crim. App. 1987); *see* discussion of *United States v. Goland* *infra* notes 192–97 and accompanying text. There is considerable variation in the States' general willingness to permit extensive voir dire. For example, Texas allows quite liberal examination. *See* McGee v. State, 35 S.W. 3d. 294, 298 (Tex. Ct. App. 2001). Illinois does not. *See* People v. Cloutier, 622 N.E.2d. 744, 781 (Ill. 1993).

[20] Mu'Min v. Virginia, 500 U.S. 415, 422 (1991); *see* Turner v. Murray, 476 U.S. 28 (1986); Ristaino v. Ross, 424 U.S. 589, 597 n.9 (1976).

[21] *Mu'Min*, 500 U.S. at 422; Rosales-Lopez v. United States, 451 U.S. 182, 190 (1981) (plurality opinion).

[22] *See* CAL. CIV. PROC. CODE § 222.5 (West 2003) (civil case rules); *id.* § 223 (criminal case rules).

[23] Batson v. Kentucky, 476 U.S. 79 (1986); *see also* discussion *infra* notes 347–58 and accompanying text.

[24] Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

4. *Peremptories Versus "For Cause" Cases*

In some jurisdictions, the rules governing the exercise of peremptory challenges are different from those governing challenges for cause.[25]

5. *Rights of Parties Versus Rights of Jurors*

Most cases turn on the rights of the parties.[26] Others turn on the rights of the jurors.[27] In attempting to understand the rationale and holding of a case it is important to be clear whose rights are at issue.

6. *Rights of Prosecutor Versus Rights of Defendant*

Similarly, in some cases, a right is given to a defendant. That right may not necessarily extend to the prosecution.[28]

7. *Challenges to a Venire Versus a Venireman*

In some cases, a party challenges an entire venire. The party may, for example, assert the jury panel was not properly composed.[29] In most of the

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[25] In California criminal cases, voir dire may be conducted only "in aid of the exercise of challenges for cause," not peremptories. *See* CAL. CIV. PROC. CODE § 223 (adopted as Proposition 115 in the June 1990 election.). That statute superseded the California Supreme Court's decision in *People v. Williams*, 628 P.2d 869 (1981), which had, in turn, overruled *People v. Edwards*, 127 P. 58 (Cal. 1912). In Maryland, too, jurors may be questioned only to determine whether there is a basis to challenge for cause. *See* Davis v. State, 633 A.2d 867, 871 (Md. 1993); *see also* United States v. Ible, 630 F.2d 389, 394–95 (5th Cir. 1980) (holding that refusal to permit certain inquiries deprived defendant of the effective exercise of his peremptory challenges); State v. Maxwell, 102 P.2d 109 (Kan. 1940) (holding that certain voir dire questioning was not an abuse of discretion insofar as challenges for cause were concerned but did not address the questioning in relation to peremptory challenges).

[26] *See, e.g.*, *Batson*, 476 U.S. at 87–88 (discussing the interests of the parties, jurors, and the community at large); Taylor v. Louisiana, 419 U.S. 522, 530 (1975); Norris v. Alabama, 294 U.S. 587, 599 (1935); Neal v. Delaware, 103 U.S. 370, 397 (1880).

[27] *See, e.g.*, *Edmonson*, 500 U.S. at 614; Powers v. Ohio, 499 U.S. 400, 407–11 (1991); United States v. McDade, 929 F. Supp. 815, 820 (E.D. Pa. 1996); Brandborg v. Lucas, 891 F. Supp. 352, 356 (E.D. Tex. 1995); United States v. Padilla-Valenzuela, 896 F. Supp. 968, 972 (D. Ariz. 1995).

[28] Consequently, the Supreme Court had to determine separately whether to extend *Batson* to permit prosecutors to challenge a defendant's exercise of peremptory challenges. *See* Georgia v. McCollum, 505 U.S. 42, 46–48 (1992).

[29] *See, e.g.*, Duren v. Missouri, 439 U.S. 357, 360 (1979); *Taylor*, 419 U.S. at 524; People v. Harris, 679 P.2d 433, 437 (Cal. 1984); Commonwealth v. Bastarache, 414 N.E.2d 984, 987 (Mass. 1980); State v. Elbert, 424 A.2d 1147,

cases discussed in this article, the relevant challenge is to an individual juror. Different considerations govern each kind of case.

8. *Challenges to Grand Juries Versus Petit Juries*

There are cases that deal with the composition of grand juries.[30] That topic is outside the scope of this article.

9. *Bias of Individual Juror Versus Bias Imputed to a Class*

In most cases, the inquiry is whether a particular juror has a bias that would preclude a fair trial. In some situations, however, courts consider whether bias may be based simply on the individual's membership in a class of persons.[31]

With these caveats in mind, this article explores three areas in which courts have struggled to define the extent to which attorneys may ask prospective jurors questions about potentially sensitive, personal matters: religion, politics, and immutable characteristics such as race, ethnicity, and nationality.

II. RELIGIOUS AFFILIATION

At common law, those who did not profess a belief in God were unqualified to serve as jurors.[32] Now, it is held to be unconstitutional to require jurors to affirm their belief in God.[33]

1148 (N.H. 1981); State v. Fulton, 566 N.E.2d 1195, 1198 (Ohio 1991).

[30] *See, e.g.*, Castaneda v. Partida, 430 U.S. 482, 493 n.12 (1977) (collecting prior grand jury discrimination cases); Smith v. Texas, 311 U.S. 128, 130–31 (1940); State v. Wright, 542 A.2d 299, 302 (Conn. 1988); State v. Castonguay, 481 A.2d 56, 63–65 (Conn. 1984); *Bastarache*, 414 N.E.2d at 987; State v. Baker, 636 S.W.2d 902, 907–08 (Mo. 1982); State v. Cofield, 357 S.E.2d 622, 624 (N.C. 1987) (discussing selection of grand jury foreman); *Fulton*, 566 N.E.2d at 1195.

[31] *See, e.g.*, Dennis v. United States, 339 U.S. 162, 181–82 (1950) (Frankfurter, J., dissenting); United States v. Greer, 968 F.2d 433, 435 (5th Cir. 1992) (en banc) (per curiam) (Smith, J., writing an opinion supporting the per curiam opinion).

[32] United States v. Joseph, 892 F.2d 118, 124 n.2 (D.C. Cir. 1989).

[33] *See* Schowgurow v. State, 213 A.2d 475, 480 (Md. 1965); State v. Madison, 213 A.2d 880, 882 (Md. Ct. Spec. App. 1965); *see also* CAL. CONST. art. I, § 4 ("A person is not incompetent to be a witness or juror because of his or her opinions on

Still, the religion of a potential juror can raise a number of questions on voir dire. This is of particular interest since jury consultants often "profile" religion,[34] and trial counsel may themselves have biases about such things.[35]

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religious beliefs."); MO. CONST. art. I, § 5 ("[N]o person shall, on account of his religious persuasion or belief, ... be disqualified from ... serving as a juror."); OR. CONST. art. I, § 6 ("No person shall be rendered incompetent as a ... juror in consequence of his opinions on matters of religion."); UTAH CONST. art. I, § 4 ("[N]or shall any person be incompetent as a ... juror on account of religious belief or the absence thereof."); 28 U.S.C. § 1862 (2003) ("No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States ... on account of race, color, religion, sex, national origin, or economic status.").

[34] *See* People v. Williams, 628 P.2d 869, 875 n.8 (Cal. 1981) (explaining that in one case, the profile of a juror favorable to the defense was a working-class Catholic earning between $8000 and $10,000 per year, who read the *New York News*); GINGER, *supra* note 4, § 5.12, at 211, § 19.55, at 1101–02; NAT'L JURY PROJECT, INC., JURYWORK: SYSTEMATIC TECHNIQUES §§ 2.06[1], 17:03[2][f] (2d ed. 2000); DONALD E. VINSON & DAVID DAVIS, JURY PERSUASION: PSYCHOLOGICAL STRATEGIES AND TRIAL TECHNIQUES 88 (3d ed. 1996); Richard L. Moskitis, Note, *The Constitutional Need for Discovery of Pre-Voir Dire Juror Studies*, 49 SO. CAL. L. REV. 597, 605 (1976); *see also* DARROW, *supra* note 1, at 313, 315 (encouraging a lawyer to inquire into a prospective juror's religion); TED A. DONNER & RICHARD K. GABRIEL, JURY SELECTION: STRATEGY & SCIENCE § 32:1 (mentioning that religion is often included in an investigator's report on prospective jurors) (3d ed. 2002); JAMES J. GOBERT & WALTER E. JORDAN, JURY SELECTION § 4.02, at 108 (2d ed. 1990) ("Among items typically included in an investigator's report [is] the prospective juror's ... religion.").

[35] *See* United States v. Stafford, 136 F.3d 1109, 1113–14 (7th Cir. 1998); State v. Davis, 504 N.W. 2d 767, 768 (Minn. 1993); F. LEE BAILEY & KENNETH J. FISHMAN, 2 CRIMINAL TRIAL TECHNIQUE § 39-48, at 39-48 (1994); FRANCIS X. BUSCH, LAW AND TACTICS IN JURY TRIALS § 146 (1949) ("Clarence Darrow ... placed a high value upon ... information [of a juror's religious affiliation]. Although an agnostic, Mr. Darrow was a deep student of ancient and contemporary religions. In a criminal case he preferred Catholics, Episcopalians, and Presbyterians to Baptists and Methodists."); WARD WAGNER, JR., ART OF ADVOCACY: JURY SELECTION § 1.04[8], 1.12 (2002). It is easier to find overt examples of bias in older literature. *See, e.g.*, FRANCIS L. WELLMAN, GENTLEMEN OF THE JURY 266, 282–83 (1924). But modern examples exist. Stacy Finz, *Is Selecting a Jury Scientific? Yeah, Right* ..., S.F. CHRON., Feb. 29, 204, at A-1, A-23 ("O'Sullivan, ... who ... does criminal defense work, likes Irish Catholics, Italians and Latinos on his juries ... Asians, Germans and evangelicals don't make good jurors, according to [him].").

Nonetheless, the extent to which trial counsel is able to discover the religion or beliefs of a venireman turns on a number of factors.[36]

It is often said that if religion is irrelevant to the case at bar, the trial counsel is not entitled to ask the religious preference of a juror,[37] but that is not invariably the case. In some states, there may be a statutory right to inquire. For example, a Georgia statute provides that "the Counsel for either party shall have the right to inquire of the individual jurors examined touching any matter . . . including . . . the religious, social, and fraternal connections of the juror."[38] Even if there is no statutory right, as with so much else involving voir dire, the trial judge enjoys considerable discretion.

The Jury Manual for the United States District Court for the Northern District of Texas contains a "Confidential Questionnaire" that suggests asking, "What is your religious preference and church affiliation, if any?"[39] According to the Fifth Circuit, "this question is standard on the juror questionnaires used in the state courts in Dallas County and recommended for the federal courts."[40]

Similarly, the Federal Judicial Center has reprinted a "Proposed Juror Questionnaire" from the United States District Court for the Eastern District of Michigan. Question 15 (which is preceded by the instruction that "[t]his question may be skipped if you wish") asks: "What is your religious affiliation at this time, if any (circle)? Protestant—Catholic—Jewish—Other—None."[41]

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[36] There appears to be no constitutional right, per se, that prospective jurors be questioned regarding possible religious bias. *See* Ristaino v. Ross, 424 U.S. 589, 596 n.8 (1976) ("In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption as a per se rule that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion.").

[37] *Davis*, 504 N.W.2d at 772; *see also In re* Malvasi's Estate, 273 P. 1097, 1100 (Cal. Dist. Ct. App. 1929) ("Ordinarily the religious belief of a prospective juror is immaterial and [the juror had] no duty . . . to volunteer.").

[38] *See* GA. CODE ANN. § 15-12-133 (2002). An earlier version of this statute was applied in *Cowan v. State*, 275 S.E.2d 665 (Ga. 1981), to reverse a conviction by a trial court that refused to permit defendant to inquire about "each juror's membership in . . . church organizations . . . ." *See id.* at 666.

[39] United States v. Greer, 968 F.2d 433, 439 n.9 (5th Cir. 1992).

[40] *Id.* at 439; *see also* Alexander v. State, 903 S.W.2d 881, 883 (Tex. App. 1995) (employing a questionnaire asking about jurors' membership in any "church . . . in which you actively participate").

[41] GORDON BERMANT, JURY SELECTION PROCEDURES IN UNITED STATES DISTRICT COURTS 34.

The same Federal Judicial Center publication reprints "Standard Voir Dire Questions" from the *Bench Book for United States District Court Judges*. Question 2.a(10) reads: "[P]lease state . . . whether you observe all religious holidays of your faith."[42]

Questionnaires used in recent trials support this. Prospective jurors in the criminal trial of Marion Barry, the former mayor of Washington, D.C., were asked: "Do you attend church or synagogue on a regular basis? If 'yes', please explain briefly."[43] Similarly, the questionnaire used in the *Exxon Valdez* trial said: "Please list all organizations you have belonged to or contributed to in the past ten years. This should include social, civic, religious, community, fraternal or other such organizations."[44] It then asked for information about the nature of the juror's involvement in the organizations in which she has been "most involved."[45]

The questionnaire in Ariel Sharon's defamation case against *Time* magazine asked prospective jurors:

> "Are you or any of your close friends or relatives of Arab, Palestinian, Lebanese, Muslim, Israeli or Jewish heritage? ___ Yes ___ No. If yes, explain. ___;
>
> What civic, educational, professional, sports, business, religious or political activities do you participate in?
>
> Have you ever made a contribution to or financially supported the State of Israel or any Arab State?"[46]

Courts have sometimes tried to summarize the circumstances in which inquiry will be permitted. For example, *Riley v. State* stated:

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[42] *Id.* at 39 (quoting THE BENCH BOOK FOR UNITED STATES DISTRICT COURT JUDGES § 1.12 (1st ed. 1971)). The Fourth Edition of the BENCH BOOK does not contain this question. *See* BENCH BOOK FOR UNITED STATES DISTRICT COURT JUDGES (4th ed. 1996).

[43] JEFFREY T. FREDERICK, MASTERING VOIR DIRE AND JURY SELECTION: GAINING AN EDGE IN QUESTIONING AND SELECTING A JURY 212 (1995).

[44] *Id.* at 238.

[45] *Id.* at 239; *see also* United States v. Battle, 979 F. Supp. 1442, 1472–73 (N.D. Ga. 1997) (in prosecution for murder of prison guard, questionnaire sought information about religious affiliation).

[46] CIVIL TRIAL PRACTICE DESKBOOK 632–35 (Robert A. Robbins et al. eds., 1997) (citations omitted). Ariel Sharon's case arose out of *Time*'s reporting of his alleged actions while serving as the Israeli defense minister. *Id.*; *see generally* 47 AM. JUR. 2d *Jury* § 272 (2003) (discussing how courts treat religious beliefs, prejudices, and memberships throughout voir dire).

> [R]eligious affiliations of prospective jurors may be a proper subject of voir dire examination if: (1) religious beliefs are involved in an issue in the case; (2) a religious organization is a party to the litigation; or (3) "special circumstances" raise the possibility of religious prejudice.[47]

Similarly, *Coleman v. United States*[48] stated as a general rule: "Inquiry as to a juror's religious beliefs is proper on voir dire where religious issues are presented expressly in the case, or where a religious organization is a party to the litigation, or where it is necessary to the exercise of peremptory challenges."[49] These are not wholly satisfactory. *Riley* does not explain what "special circumstances" are, and both formulations fall short of the wide variety of cases in which inquiry has properly been permitted.[50]

A. Religious Organization as Party

Where a religious organization is party to the litigation, inquiry into religious affiliation is allowed to some extent. "[I]n a civil case, if the action is between religious institutions or their representatives, or concerns church property, a reasonable inquiry should be permitted as to a juror's religious affiliations and his attitude in the particular case."[51]

For example, in *Hornsby v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints*, plaintiff was injured when his motorcycle struck a cow owned by the church.[52] At trial, his counsel sought to ask every prospective juror whether he or she was a member of or held a position in the church, and whether that would affect the juror's ability to evaluate the evidence.[53] The trial court refused to permit that, saying, "it's none of this Court's business, or anybody's business what [jurors'] religious preferences are."[54] The court of appeals reversed. Citing a party's

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[47] Riley v. State, 496 A.2d 997, 1006 (Del. 1985).

[48] Coleman v. United States, 379 A.2d 951, 954 (D.C. 1977).

[49] *Id.* (citing 47 AM. JUR.2d *Jury* § 283 (1969)); *see also* 54 A.L.R. 2d 1204 (1957).

[50] Coleman, 379 A.2d. at 954.

[51] BUSCH, *supra* note 35, § 146, at 211 (citing Cleage v. Hayden, 53 Tenn (6 Heisk.) 73 (1871)).

[52] Hornsby v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints, 758 P.2d 929, 931 (Utah Ct. App. 1988).

[53] *Id.*

[54] *Id.* The trial judge did ask, "Are there any of you who feel that you would have trouble being an impartial juror because of feelings you may have either pro or con with regard to the L.D.S. Church that you think might affect your ability to

right to exercise peremptory challenges, it said, "Whenever a religious organization is a party to the litigation, voir dire regarding the jury panel's religious affiliation is proper."[55]

Compare that with *Congregation of the Passion v. Touche Ross.*[56] Plaintiff was "a corporate entity and an order of the Roman Catholic Church."[57] The trial court permitted some inquiry regarding "membership in, or employment by, any religiously affiliated institution or organization." But jurors were not asked to reveal their own religious affiliation, and the defendant was not permitted to ask whether prospective jurors had made any contribution to the plaintiff, who was suing for lost investment funds.[58] The Supreme Court of Illinois affirmed, citing the trial court's discretion in such matters; the court indicated the better practice for the parties would have been to permit questions about contributions to the church, since the loss of those funds was at issue.[59] That is the least that should have been asked if the parties were to have some assurance of an impartial jury.

B. Possible Bias Because of Religion of Party, Witness or Lawyer

Some cases raise a concern that potential jurors will be biased against a party because of his religion.[60] For example, in *United States v. Hoffman*, defendant was an adherent of the Reverend Sun Yung Moon.[61] On voir dire, the court asked whether anyone has "any bias or prejudice against the

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be a fair and impartial juror in this case?" *Id.* at 931–32.

[55] *Id.* at 933 (citing State v. Via, 704 P.2d 238 (Ariz. 1985); Coleman v. United States, 379 A.2d 951 (D.C. 1977); Casey v. Roman Catholic Archbishop of Baltimore, 143 A.2d 627 (Md. 1958)). In *Casey*, a parishioner slipped and fell on a waxed floor in church, sustaining significant injuries. *Casey*, 143 A.2d at 629. The court of appeals faulted the trial court's crabbed voir dire and stated, "[I]f the religious affiliation of a juror might reasonably prevent him from arriving at a fair and impartial verdict in a particular case . . . the parties are entitled to ferret out, or preferably have the court discover for them, the existence of bias or prejudice resulting from such affiliation." *Id* at 632.

[56] Congregation of the Passion v. Touche Ross, 636 N.E.2d 503 (Ill. 1994).

[57] *Id.* at 505.

[58] *Id.* at 516.

[59] *See id.*

[60] A recent example of a case in which sympathy for a party's religion was held to interfere with a juror's ability to discharge his duties is *Al-Bari v. Crody*, No. 93–6402, 1995 WL 523375 (6th Cir. 1995). There a juror was dismissed because he expressed a view that defendant's religious beliefs should have been given more deference than the law permitted. *Id.* at **2.

[61] United States v. Hoffman, 806 F.2d 703, 705 (7th Cir. 1986).

Unification Church or the Reverend Sun Yung Moon, and would that bias or prejudice prevent you from judging the facts in this case fairly and objectively."[62] Those who said they had such a bias were excused. The Seventh Circuit held that was sufficient.[63]

On appeal from Reverend Moon's own conviction for tax evasion, "public animosity toward Moon and his religion," the Second Circuit held, "could be satisfactorily resolved only upon voir dire of prospective jurors."[64] In that case jury selection lasted "seven painstaking days."[65]

On the other hand, a judge may limit or refuse such questioning when she does not expect the party's religious beliefs to be put in evidence. For example, in *United States v. Lowell*, the court held there was no reason to ask whether jurors would be prejudiced against defendant simply because he is Jewish when, apparently, no party sought to introduce evidence of defendant's religion.[66]

People v. Velarde represents the same idea.[67] The defendant was an atheist, yet the Colorado Supreme Court said the trial judge properly refused defendant's request to ask jurors' religious affiliation since they would hear no evidence of defendant's irreligion. It is not necessarily reversible error to refuse to permit such questions, even if the party's religion does become known.[68]

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[62] *Id.* at 705.

[63] *Id.* at 710.

[64] United States v. Sun Myung Moon, 718 F.2d 1210, 1218 (2d Cir. 1983).

[65] *Id.* In *Mu'Min v. Virginia*, 500 U.S. 415 (1991), the trial judge permitted counsel to ask prospective jurors about their "feelings toward members of the Islamic Faith." *See id.* at 421. Courts sometimes conflate the religious, ethnic, and national origin dimensions of Islamic defendants. *See infra* note 326.

[66] *See* United States v. Lowell, 490 F. Supp. 897, 906–07 (D.N.J. 1980).

[67] *See* People v. Velarde, 616 P.2d 105, 105 (Colo. 1980).

[68] *See* United States v. Alarape, 969 F.2d 349, 351 (7th Cir. 1992) ("A judge serves the interest of justice by keeping potentially distracting information under wraps. Questions about religion would have injected an unnecessary issue."); Yarborough v. United States, 230 F.2d 56, 63 (4th Cir. 1956) (holding that inquiry is unnecessary when irrelevant to case). Where defendants fail to propose voir dire questions, it is within the court's discretion to refrain from asking specific questions about religious bias, even though such questioning might have been proper. United States v. Washington, 705 F.2d 489, 495–96 (D.C. Cir. 1983) (affirming the conviction of a number of the Black Hebrews); United States v. Dickens, 695 F.2d 765, 774–75 (3d Cir. 1982) (Black Muslims accused of RICO violations); State v. Mauro, 716 P.2d 393, 398 (Ariz. 1986) (defendant's proposed questions poorly drafted, argumentative, vague, and unfair); *see also* People v. Weitz, 267 P.2d 295, 302 (Cal. 1954). In *Weitz*, prosecutor asked jurors whether

Similar issues have arisen in more unusual contexts. For example, state and federal courts in New York have grappled with whether parties, witnesses, or lawyers could wear religious garb in court. In two cases, the courts held that any prejudice, for or against a party or witness' religion, could (and should) be ferreted out on voir dire.[69] In a third case, an attorney was not permitted to wear his priest's collar while representing a client. It was held that voir dire would not be sufficient to discover bias.[70]

In *Nunfio v. Texas*, the defendant was charged with raping a nun.[71] The trial court refused to permit defense counsel to discuss the vocation of the victim during voir dire. The appellate court reversed, saying it was appropriate to ask about "potential bias or a prejudice in favor of the victim by virtue of her vocation."[72]

C. *Religious Affiliation Versus Beliefs*

These cases should not obscure a fundamental point. It has been said more specifically that "[i]t is necessary to distinguish among religious

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they were members of the Seventh Day Adventist Church even though there was no evidence of defendant's religion, and the high court held that there was no prejudice to defendant. *Id.*

[69] People v. Drucker, 418 N.Y.S.2d 744 (1979) (witness permitted to wear clerical garb); Close-it Enters. v. Weinberger, 407 N.Y.S.2d 587 (1978) (party permitted to wear skull cap).

[70] See *LaRocca v. Gold*, 662 F.2d 144, 150 (2d Cir. 1981) and the many cases it cites in chronicling Father LaRocca's litigation of this issue.

[71] *See* Nunfio v. Texas, 808 S.W.2d 482, 483 (Tex. Ct. Crim. App. 1991), *overruled by* Barajas v. State, 93 S.W. 3d 36, 40 (Tex. Ct. Crim. App. 2002).

[72] *See id.* at 484; *see also* Coleman v. United States, 379 A.2d 951, 954 (D.C. 1977) (Roman Catholic priests victims of armed robbery in church rectory); People v. Dallas, 405 N.E.2d 1202, 1211–13 (Ill. 1980) (nuns victims of armed robbery and attempted murder). *But see* McFadden v. State, 402 A.2d 1310, 1311 (Md. 1979) (holding no error in refusing to ask whether potential jurors would give greater weight to testimony of rape victim if she testifies she is "a missionary or Christian lady"); *see also* Riley v. State, 496 A.2d 997 (Del. 1985). In *Riley*, the victim was a devout Roman Catholic and the church had sponsored fund raisers for his orphaned children. *Id.* at 1001–02. The court held it was sufficient to ask, "Were you involved or did you in any way contribute to, [or] take part in any series of fund raisers or activities sponsored or assisted by or associated with the Holy Cross Church or School in connection with the family of James E. Feeley, Sr.?" *Id.* at 1006 (alteration in original). The defendant's request to ask whether the jurors were (or "associated with" or "friends with") members of the Roman Catholic Church was properly refused. *Id; see also* United States v. Millar, 79 F.3d 338, 342 (2d Cir. 1996) (holding that it is not error for the district court to advise venire that defendant was a priest and ask about possible religious bias).

affiliation, a religion's general tenets, and a specific religious belief."[73] In *United States v. Stafford*, the Seventh Circuit observed that it is "improper and perhaps unconstitutional to strike a juror for being a Catholic, Jew, Muslim, etc. It would be proper to strike him on the basis of a belief that would prevent him from basing his decision on the evidence and instructions, even if the belief had a religious backing."[74]

The classic cases were the polygamy prosecutions of the late nineteenth century.[75] There, courts routinely determined whether members of the venire shared defendant's belief in polygamy.

In these cases, the precise disqualifying bias was not simply the fact that the juror was a member of the Mormon Church; it was found in his deeply held religious beliefs. Indeed, jurors seem not to have been asked "what is your religion?" The grounds for disqualification included relevant factors such as this:

> "[Venireman] Dunn, in answer to questions propounded to him, testified that he believed polygamy to be right, that it was ordained of God, and that the revelations concerning it were revelations from God, and that those revelations should be obeyed, and that he who acted on them should not be convicted by the law of the land."[76]

In other instances, jurors were excused after admitting they were polygamists or after refusing to respond on the ground that an answer might incriminate them.[77]

These cases are sometimes read as permitting discrimination against Mormon jurors. Thus, in *Miles*, petitioner claimed, "it was the deliberate purpose of the [trial] court to exclude from the jury every one who was of the Mormon faith .... Neither the court nor counsel had the right to inquire

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[73] *See* United States v. Stafford, 136 F.3d 1109, 1114 (7th Cir. 1998).

[74] *See id.* As *Stafford* suggests, it appears to be an open question whether it is unconstitutional to strike a juror simply because of his religion. *See also* Battle v. Delo, 19 F.3d 1547, 1564 (8th Cir. 1994) ("[D]ischarging a potential juror for his religious or moral beliefs violates a defendant's constitutional rights...."); United States v. Greer, 968 F.2d 433, 441 (5th Cir. 1992) (district court had said it was unconstitutional to strike based on religion of venireman, but equally divided court of appeals did not decide the question); *infra* note 101 (discussing *Davis v. Minnesota*, 511 U.S. 1115 (1994)).

[75] *See, e.g.*, Miles v. United States, 103 U.S. 304 (1880); Reynolds v. United States, 98 U.S. 145 (1878).

[76] *Miles*, 103 U.S. at 306.

[77] *See Reynolds*, 98 U.S. at 147–48; *Miles*, 103 U.S. at 307.

into the religious belief of the juror."[78] The Supreme Court, however, squarely rejected that claim when it characterized *Reynolds* and *Miles* only a few years after deciding them:

> A juror who has conscientious scruples on any subject, which prevent him from standing indifferent between the government and the accused, and from trying the case according to the law and the evidence, is not an impartial juror. This court has accordingly held that a person who has a conscientious belief that polygamy is rightful may be challenged for cause on a trial for polygamy.[79]

There are many similar cases. In *United States v. Ible*, the court held that counsel should have been permitted to inquire into prospective jurors' religious beliefs about alcohol when the defendant's drinking would be an issue at trial.[80] In *People v. Wilson*, counsel was permitted to ask a minister of a fundamentalist Christian church "numerous questions concerning his personal religious beliefs" to determine whether he could be impartial in the trial of a voodoo priest accused of sexual assault on a child.[81]

In *United States v. Joseph*, a minister said, on voir dire, that he would be unable to follow the judge's instructions if they were contrary to what he believed to be the Lord's instructions.[82] He was excused for cause.[83] In

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[78] *Miles*, 103 U.S. at 309.

[79] Logan v. United States, 144 U.S. 263, 293 (1892). The significance of this distinction is underscored if one considers what would be appropriate in jury selection in a prosecution for polygamy in Utah today. Although the Mormon Church no longer preaches polygamy, there are still some members of the church who believe (and practice) it. Thus, on jury selection, it would not be church membership, but individual belief, that would be relevant to a juror's impartiality.

[80] United States v. Ible, 630 F.2d 389, 394–95 (5th Cir. 1980). In *Ible*, it was said that refusal to permit such inquiry deprived defendant of the effective exercise of his *peremptory* challenges. *See id.* at 394; *accord* State v. Ball, 685 P.2d 1055, 1060–61 (Utah 1984).

[81] *See* People v. Wilson, 678 P.2d 1024, 1027 (Colo. Ct. App. 1983).

[82] *See* United States v. Joseph, 892 F.2d 118, 122–23 (D.C. Cir. 1989).

[83] *Id.* at 123. The D.C. Circuit Court of Appeals was critical of the trial judge's last question—"Well, what you are saying is that if there is a conflict between what the Lord has told you and what I'm telling you, the Lord prevails." (The juror responded, "That's right.") *Id.* The court noted "requiring a choice between obedience to God and obedience to the law, did not accurately test his fitness to serve as a juror, as certainly many or most religious persons actually put to that test would respond in the same fashion as the juror in this case." *Id.* However, "while we certainly do not recommend that district court judges make a practice of putting

United States v. Pappas, a juror said he was a "Born Again Christian [and] he cannot serve in the judgment of his fellow man."[84] Understanding that to mean "because of religious scruples, [he] would not be able to pronounce judgment on another individual," the appellate court affirmed the trial judge's dismissal of the juror.[85]

Similarly, in *United States v. Burrous*, the Second Circuit held there was no abuse of discretion in dismissing a juror during deliberations for asserting a religious conviction against passing judgment on a defendant.[86] The court noted with approval that trial courts "often" avoid this by asking "during jury selection whether any juror has religious beliefs that could prevent the juror from rendering a verdict based on the evidence."[87]

Standard texts suggest just such questions. For example, one proposes asking, "Do you have any religious, moral or ethical beliefs that would make it difficult for you to pass judgment on this or any other defendant?"(for criminal cases)[88] and "Do you have any religious, moral or ethical beliefs that would make it difficult for you to decide this case in favor of either party?" (for civil cases).[89] These appear to be appropriate formulations.

United States v. Greer is a particularly instructive case.[90] The defendants were "skinheads," charged with "hate crimes" against Hispanics, blacks, and Jews. The trial judge administered a questionnaire that asked whether prospective jurors "regularly attended 'church, temple, or other religious services'; [and] whether he or she held 'any offices in a church, temple or religious organization' and, if so, what that office was."[91] But the

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the question posed in this case, we cannot conclude, given the deference we owe, that the District Court necessarily erred in the exclusion of this single juror." *Id.* at 124.

[84] *See* United States v. Pappas, 639 F.2d 1, 3–4 (1st Cir. 1980).

[85] *See id.* at 4 (citing United States v. Lawrence, 618 F.2d 986 (2d Cir. 1980)).

[86] *See* United States v. Burrous, 147 F.3d 111, 117 (2d Cir. 1998).

[87] *See id.* at 117 n.5; *see also* United States v. Geffrard, 87 F.3d 448, 452 (11th Cir. 1996) (holding that after deliberations are underway, proper to dismiss a juror who, because of "religious beliefs at odds with the factual situation and the law applicable to this case, made it plain she could not follow the court's instructions."); *Lawrence*, 618 F.2d at 986 illustrating another solution to this problem when it surfaces after jury deliberations have concluded.

[88] FREDERICK, *supra* note 43, at 193.

[89] *Id.* at 203.

[90] *See* United States v. Greer, 968 F.2d 433 (5th Cir. 1992) (en banc) (per curiam).

[91] *Id.* at 436 (Smith, J., writing for those who would affirm).

trial judge refused to permit defendants to ask which members of the venire were Jewish. He also refused to permit defendants to "ask the venire specific questions about the subject matter of the case and whether that would affect their impartiality."[92] Finally, he denied defendants' motion to strike for cause all black, Hispanic, and Jewish members of the panel.[93]

Hearing the case en banc, the Fifth Circuit was evenly divided. The challenge to strike members of all three groups for cause did not attract the vote of any of the judges, but they split over how much voir dire was necessary to insure a fair trial.[94] Those judges voting to reverse recognized that recent Supreme Court cases, such as *Batson*,[95] require limits on the exercise of challenges so that the equal protection rights of the potential jurors are not denied; however, they observed the tension between that concern and the rights of the defendants to an impartial jury.[96] The seven judges who would have affirmed the convictions found the trial judge struck the right balance;[97] the seven who would have reversed believed he did not.[98]

The latter identified the difficult nature of the problem when trying to probe behind stereotypes:

> If we are to eliminate peremptory challenges based on racial stereotypes, as *Batson, Edmonson,* and *McCollum* mandate, we must insist on a searching inquiry into the *individual* biases and prejudices of members of the venire in civil rights cases redolent with prejudice, bias, and anger. This includes investigation of the potential for racial bias on the part of individual jurors. . . . The rights of defendants were lost in the effort to protect the venire.[99]

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[92] *See id.* at 440 (Higginbotham, J., writing for those who would reverse).

[93] *See id.* at 439 (Higginbotham, J., writing for those who would reverse).

[94] *See id.* at 434, 438.

[95] Batson v. Kentucky, 476 U.S. 79 (1986).

[96] *Greer*, 968 F.2d at 442 (Higginbotham, J., writing for those who would reverse).

[97] *Id.* at 438 (Smith, J., writing for those who would affirm).

[98] *Id.* at 446 (Higginbotham, J., writing for those who would reverse).

[99] *Greer*, 968 F.2d at 446 (Higginbotham, J., writing for those who would reverse). Eisemann shows an unaccountable sympathy for the notion that all Hispanic and Jewish jurors should have been excluded. *See* Eisemann, *supra* note 10, at 12-13. That gives far too much credit to the notion of implied group bias and ignores the real question: could an individual juror judge the case fairly? It might have been better if the trial judge had permitted counsel to determine which prospective jurors were Jewish, not so they could be excluded, but so that they

Although *Greer* was influenced by *Batson* and its progeny, it is an open question as to whether the exercise of peremptory challenges based on religion gives rise to a *Batson* challenge. In *State v. Davis*, the Minnesota Supreme Court held that *Batson* does not extend to religious affiliation.[100] Justices Scalia and Thomas dissented from the United States Supreme Court's denial of certiorari.[101] They argued that the case should be remanded for reconsideration in light of the then-recent decision in *J.E.B. v. Alabama ex rel. T.B.*[102] Given the logic of the cases, remand would have been the correct result.

D. Death Penalty Cases

Questions regarding jurors' religion-based views (or similar scruples) also arise in death penalty cases. Thirty years ago, in *Witherspoon v. Illinois*, the Court held that jurors may not be excluded simply for having conscientious or religious scruples against the death penalty, but that those who could never inflict it may be dismissed.[103]

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could be questioned more carefully and intelligently. As a corollary, the trial judge should have been alert to the use of peremptories to exclude Hispanic or Jewish jurors based on an implication of group bias.

[100] State v. Davis, 504 N.W.2d 767 (Minn. 1993), *cert. denied*, 511 U.S. 1115 (1994).

[101] *See* Davis v. Minnesota, 511 U.S. 1115, 1116 (1994). The dissenting justices argued that *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), extended *Batson* to gender based challenges. Since claims of discrimination of gender are reviewed under the "intermediate scrutiny" test, the justices argued, "no principled reason immediately appears for declining to apply *Batson* to any strike based on a classification that is accorded heightened scrutiny under the Equal Protection Clause." *See Davis*, 511 U.S. at 1117.

[102] *Davis*, 511 U.S. at 1118. *J.E.B.*, 511 U.S. at 127. *But see* People v. Wheeler, 583 P.2d 748 (Cal. 1978). In dicta, *Wheeler* states that the exercise of peremptory challenges to remove members of "an identifiable group distinguished on racial, religious, ethnic or similar grounds" is improper. *See id.* at 761; *accord* People v. Motton, 704 P.2d 176 (Cal. 1985); People v. Lopez, 3 Cal. App. 4th Supp. 11 (Cal. Ct. App. 1991).

[103] *See* Witherspoon v. Illinois, 391 U.S. 510 (1968). "[W]e hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.* at 522. Then, the Court noted:

> We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the

More recently, the Supreme Court revised its teaching. In *Wainwright v. Witt*, the Court stated that "the proper standard for determining when a prospective juror may be excluded for cause because of his views on capital punishment" should be "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' "[104] Both *Witherspoon* and *Witt* follow *Stafford*'s view that the appropriate focus is the juror's belief (even if based in religion) rather than his religious affiliation.[105]

E. Cross-Section

Finally, a line of Supreme Court authority holds that a defendant has a right to a venire that is a representative cross-section of the community.[106] In *United States v. Joseph*, the defendant argued that dismissal of a juror

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> only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

Id. at 522 n.21.

[104] Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)). The Court added, "in addition to dispensing with *Witherspoon*'s reference to 'automatic' decision making, this standard likewise does not require that a juror's bias be proved with 'unmistakable clarity.' " *Id.* In *Morgan v. Illinois*, 504 U.S. 719 (1992), the Court held defendants are entitled to "reverse-*Witherspoon*" venire by asking whether a prospective juror automatically vote to impose the death penalty following a conviction in a capital case. *Id.* at 733–34.

[105] *See supra* notes 71 & 72 and accompanying text.

[106] *See* Holland v. Illinois, 493 U.S. 474, 480 (1989); Duren v. Missouri, 439 U.S. 357, 370 (1979); Taylor v. Louisiana, 419 U.S. 522, 528–30 (1975); Ballard v. United States, 329 U.S. 187, 191 (1946); Thiel v. S. Pac. Co., 328 U.S. 217, 220 (1946); Smith v. Texas, 311 U.S. 128, 129–30 (1940) (grand juries); *see also* 28 U.S.C. § 1861 (2003) (declaring the United States policy that the entitlement to jury includes one selected from a fair cross-section of the community). Although the Sixth Amendment has been held to be applicable to the States through the Fourteenth Amendment, *see* Taylor v. Louisiana, 419 U.S. 522, 526 (1975); Williams v. Florida, 399 U.S. 78, 86 (1970); Duncan v. Louisiana, 391 U.S. 145, 146 (1968), the "fair cross-section" result has also been reached on state constitutional grounds. *See* People v. Wheeler, 583 P.2d 748, 758 (Cal. 1978); Illinois v. Payne, 436 N.E.2d 1046, 1048 (Ill. App. Ct. 1982).

with strong religious views precluded a fair trial.[107] The Court easily rejected that challenge on alternate grounds: first, there was no defined class being excluded; second, the trial judge is given broad discretion in determining "for cause" challenges; and third, exclusion of only one juror is not ordinarily grounds for reversal.[108]

F. Summary of Observations

What, then, do these cases show us? Competing with counsel's desire for information are proper concerns about discrimination and privacy. Although the cases rarely say so, the subtext of many cases reflect the general rule that a person may not be disqualified from jury service by virtue of his religion.[109] In addition, it is sometimes said the venireman's religious beliefs are private matters,[110] and there is sometimes a concern that religion not be injected into a trial in which it has no place.[111] Consequently, whether to permit inquiry in this area must be the subject of careful judgment.

There are many cases in which courts have found it appropriate to permit inquiry into a juror's religious affiliation to begin to determine whether he should be challenged for cause. Some cases present issues in which inquiry is necessary to determine if a juror harbors a bias simply because of the religion of a participant in the trial. Thus, in cases in which a church is a party, a religious figure has been a victim, or someone associated with a minority (and, perhaps, unpopular) religion is a party, witness, victim, or lawyer, it is understandable that a court would permit

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[107] United States v. Joseph, 892 F.2d 118, 122–24 (D.C. Cir. 1989).

[108] *See id.* at 124.

[109] *See* 28 U.S.C. § 1862; *supra* note 33 and accompanying text. Presumably, this means that a clerk of court could not exclude all Jews from the jury pool, for instance. It does not appear to have been applied to determine whether to permit questioning of individuals once they have been called into the jury box. Nonetheless, the principle of nondiscriminatory treatment is deeply held and colors some of these cases. Conversely, a statute may permit inquiry. *See supra* note 38 and accompanying text (discussing the Georgia statute that permits such an inquiry).

[110] *See, e.g.*, Yarborough v. United States, 230 F.2d 56, 63 (4th Cir. 1956) (referring to religion as a "private matter"); Hornsby v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints, 758 P.2d 929, 931 (Utah 1988) (reversing the court's decision that "it's none of this Court's business, what [jurors'] religious preferences are."

[111] *See supra* notes 66–68 and accompanying text.

inquiry, not as the end, but the beginning of a line of potentially relevant questions.

Similarly, where a juror's beliefs are relevant to the case at hand, it is appropriate to inquire about them, even if they are rooted in religious faith. The overview question, "Do you have any religious, moral or ethical beliefs that would make it difficult for you to decide this case in favor of either party?" is generally inoffensive. It may, however, be of limited utility in cases in which religion or religious views have a substantial bearing on the controversy. So, courts have permitted more detailed inquiry in, say, polygamy and abortion prosecutions.[112] Likewise, courts have permitted counsel to determine if a juror believes (for example) that it is improper to pass judgment on a fellow man.[113]

To the extent that counsel wishes to inquire about a juror's religion to inform a peremptory challenge, the issue becomes more problematic. Since *Batson*, there is a sense that it may not be proper to strike a juror peremptorily based on her religion.[114] If one cannot base a peremptory strike on that ground, why ask? But the issue is more complicated than that.

Lawyers often use religion as a starting point for inquiry into beliefs that may have a direct bearing on the case. Although a member of a given denomination may not share all (or any) of its values, still, that membership may be a clue that can help counsel focus his questions.[115] Learning a

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[112] Courts have split on this question in abortion prosecutions. *Compare* City of Kettering v. Berry, 567 N.E.2d 316, 321 (Ohio App. 1990) (per curiam) (holding that there is no error to deny questions about religious affiliation in prosecution for criminal trespass at abortion clinic) *with* State v. Barnett, 445 P.2d 124, 125 (Ore. 1968) (holding that it is reversible error to prohibit defendant from asking prospective jurors their religious faiths).

In suits against contraceptive manufacturers, a questionnaire used in Michigan state courts asked women, "What is your religious preference?" and listed a number of denominations; then it asked "Would your religious preference or moral beliefs in any way affect you in serving as a juror in a lawsuit of this nature?" GINGER, *supra* note 4, § 12.30, at 777.

[113] *See* State v. Fulton, 566 N.E.2d 1195, 1200–01 (Ohio 1991) (stating that jury commissioners "routinely excluded members of the Old Order Amish religious faith because they believed that such individuals would not participate in jury duty due to their well-known prohibition . . . to '[j]udge not, and ye shall not be judged: condemn not, and ye shall not be condemned: forgive, and ye shall be forgiven' " (alteration in original)).

[114] This is not yet established as a matter of federal law. *See supra* note 101 (discussing *Davis v. Minnesota*).

[115] *See* WERCHICK, *supra* note 4, §§ 4.1, 8.8.

juror's religious affiliation should not be the end of the inquiry, but it may be an important beginning if the denomination has beliefs relevant to the case. Does the juror share those beliefs? If so, can he set them aside and judge this case fairly? If he does not share those beliefs, is there something special about his apostasy that raises a red flag for one side or the other?

As the dissent observed in *Greer*, there is something of a paradox.[116] If counsel is to move beyond stereotypes, yet make an intelligent use of his peremptory challenges, he needs more, not less, information, especially in cases in which religious issues may play a part.[117]

So, the more relevant religious affiliations or views are to a case, the more willing courts are to permit probing for peremptories. Most courts, however, properly take pains to insure that the inquiry is focused on the juror's individual views.[118] Even where the basis for the question is a peremptory challenge (rather than one for cause) the court should keep the focus on determining whether the juror's beliefs may prevent him or her from approaching the case fairly. In this regard, a juror's religious beliefs are simply one set of beliefs and opinions, among many, which may be relevant to the case at hand, and may be probed on voir dire.

But that still leaves the concern about privacy. Courts sometimes manage this concern by utilizing a juror questionnaire. That seems less invasive. At least it may spare the juror having to discuss such things in open court.[119]

Whether using a questionnaire or asking questions in open court, both bench and bar should consider how obvious it is to the prospective jurors that religion or religious beliefs will be at issue in the case. If the statement of the case makes apparent the relevance of inquiry into religious matters, then jurors will more likely understand why they are being asked about something they may consider private. But if jurors have no reason to think

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[116] *See* United States v. Greer, 968 F.2d 433, 442 (5th Cir. 1992) (Higginbotham, J., writing for those who would reverse) (stating that the courts are "reluctant to create the impression that the outcome of the judicial process turns on the race of the participants," but courts "cannot will [prejudices] away by refusing to probe both for their presence and their reach in a given case").

[117] *Id.*

[118] The corollary of this is that courts must be alert to prevent the use of peremptories to exclude jurors based solely on their religion. Although the Supreme Court denied hearing in *Davis*, 511 U.S. at 1115, a juror's equal protection rights should prevent such a challenge.

[119] The questionnaire may make disclosure of a juror's religion optional. Similarly, a court may advise jurors that they may discuss, in camera, special concerns they have about such matters.

religious matters are relevant to the case, they are more likely to find the inquiry offensive.

Ultimately, the court must first determine whether there is a legitimate interest in inquiry. If so, it must then weigh that interest against the risk that jurors may feel their privacy is being invaded needlessly. The latter can be minimized by careful explanation. As to some jurors, however, it may never be eliminated. Nonetheless, in an appropriate case, carefully tailored inquiry should be permitted.

III. POLITICAL AFFILIATION

Attorneys often wish to know the political affiliation and views of prospective jurors. Advice from one practice manual suggests that an attorney "investigate members of the veniere [and c]onsult . . . public records (such as voter registration lists . . .), or privately published jury books containing background information on those called for jury duty."[120] Clarence Darrow included "politics" in the list of "all important subjects for questioning potential jurors."[121] Trial manuals on civil cases also offer general advice that the politics of a jury member matters—"plaintiff often favors liberals, while defendant often favors conservatives."[122] More sophisticated treatments of the subject avoid such gross generalizations, but still recommend seeking information about political affiliation.[123]

When jury consultants profile mock jurors, they often include political affiliation in the list of facts known about each juror.[124] When recommend-

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[120] *See* 2 CALIFORNIA TRIAL HANDBOOK § 18:9 (1992); *accord* CATHY BENNETT ET AL., BENNETT'S GUIDE TO JURY SELECTION AND TRIAL DYNAMICS IN CIVIL AND CRIMINAL LITIGATION § 9.12 (West 1993); GOBERT & JORDAN, *supra* note 34, § 4.02, at 108 ("Among items typically included in an investigator's report are the prospective juror's . . . political affiliation.").

[121] *See* DARROW, *supra* note 1, at 315.

[122] *See* CALIFORNIA TRIAL HANDBOOK, *supra* note 120, § 18:13.

[123] DONNER & GABRIEL, *supra* note 34, § 32:1; *see* WERCHICK, *supra* note 4, § 7.3, at 69–70. "Republicans and Democrats are no longer making very useful statements about probable behavior as jurors. Some trial lawyers cling to the idea that a Republican will be pro-defense and a Democrat will be pro-plaintiff; unfortunately, it is not so easy." *Id.* at 69. The author then discusses "strong party identification," "inconsistent political registration," "non-voters," and similar matters, concluding: "The feeling persists that political affiliation and registration information is a useful element of voir dire. If such information is readily and economically available, it is the type of additional information that may give a slight edge to the attorney who troubles to integrate it into the jury selection plan." *Id.* at 70.

[124] *See, e.g.*, GINGER, *supra* note 4, § 19.55, at 1102; GOBERT & JORDAN, *supra* note 34, § 3.03, at 84; NAT'L JURY PROJECT, *supra* note 34, § 11.04[3][a], at 11-23, 11-27.

ing which veniremen to select (or deselect), political registration may be among the criteria. They may also suggest learning whether a juror is politically active, with what associations he affiliates, and how he views current political controversies.

But what does the law permit? When is it appropriate to inquire into politics during voir dire? To what extent may an attorney probe? Must a juror answer?

One can find absolute statements in the law. At least one court has made the broad statement that "in order to ascertain whether a juror is prejudiced in a particular case, it has always been held proper to inquire as to his membership in any political, religious, social, industrial, fraternal, law-enforcement, or other organization whose beliefs or teaching would prejudice him for or against either party to that case."[125]

Sometimes a jurisdiction will allow indirect inquiry into a juror's politics. For example, the California Judicial Council has approved a juror questionnaire for civil cases that includes the following question: "If you have any ethical, religious, political or other beliefs that may prevent you from serving as a juror, explain."[126]

Other jurisdictions have held that "[t]he politics of a juror is not a proper subject of inquiry in any case, criminal or civil, unless a political controversy is directly involved."[127] And, "there are some questions that are always pertinent . . . . Other questions, such as political or religious affiliation of the jurors . . . only become pertinent under peculiar circumstances."[128] The tension between privacy and disclosure has translated into much confusion regarding when, if ever, an attorney is allowed to inquire into the political or ideological affiliations of potential jurors.[129]

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[125] *See* People v. Buyle, 70 P.2d 955, 957 (Cal. App. 1937). Surprisingly, this was the same court that eight years earlier had decided *In re Malavasi's Estate*, 273 P. 1097 (Cal. App. 1929) (holding that "[o]rdinarily the religious belief of a prospective juror is immaterial and [the juror had] no duty . . . to volunteer").

[126] *See* Juror Questionnaire for Civil Cases approved by the Judicial Council of California (MC-001, Eff. Jan. 1, 2004).

[127] BUSCH, *supra* note 35, § 146, at 211.

[128] Rose v. Sheedy, 134 S.W.2d 18, 19 (Mo. 1939) (holding that voir dire questions as to jurors' religious or political beliefs should not be allowed until the trial court has been convinced that such questions are relevant).

[129] A long line of cases has established that in civil or criminal trials, it is unconstitutional to exclude prospective jurors solely on the basis of membership in certain types of groups. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 146 (1993) (gender); Hernandez v. New York, 500 U.S. 352, 355 (1990) (ethnicity); Batson v. Kentucky, 476 U.S. 79, 84 (1986) (race). Other cases, however, have

To understand how courts have determined whether to permit questioning a juror's political registration, affiliations, and beliefs, it is best to examine three lines of cases separately: (A) cases involving political corruption,[130] (B) cases involving times of deep political controversy, and (C) ordinary, non-political cases.

A. Political Corruption Cases

By their nature, political corruption cases push the political activity, affiliation, and allegiance of the prospective jurors to the forefront of the lawyers' concerns. Yet some cases have taken a rather firm stand against inquiry. For example, in *State v. Longo* defendant was charged with filing a Democratic Party primary nominating petition that he knew to contain forged signatures.[131] At trial, defendant sought to ask prospective jurors whether they were members of the Democratic Party or had participated in the primary election at issue.[132] The trial judge refused to permit that.[133] The Supreme Court of New Jersey affirmed, saying "mere membership in the democratic party and participation in the primary election would hardly indicate bias or prejudice against one accused of filing a nomination petition for primary election knowing the same to be falsely made."[134] Simply belonging to the Democratic Party does not necessarily suggest a juror would be biased against the defendant.[135]

Most political corruption cases do not take such an absolute stand. *Connors v. United States* was perhaps the first Supreme Court case to consider when an attorney may ask prospective jurors about their political affiliations.[136] *Connors* was a prosecution for ballot box tampering. In what must have been a particularly contentious election, James Connors "with

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held that it is constitutional to base juror exclusion on certain characteristics. *See* United States v. Jackson, 983 F.2d 757, 762 (7th Cir. 1993) (age); United States v. Mojica, 984 F.2d 1426, 1451 (7th Cir. 1993) (age); Whitehead v. State, 608 So. 2d 423, 428 (Ala. Crim. App. 1992) (marital status); Lege v. N.F. McCall Crews, Inc., 625 So. 2d 185, 189 (La. Ct. App. 1993) (physical disability).

[130] "Political corruption" is used in the broadest sense to include an accusation of wrongdoing involving the political process or by an officeholder.

[131] State v. Longo, 3 A.2d 127, 127 (N.J. 1938).

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *See id.*

[136] *See* Connors v. United States, 158 U.S. 408, 412–16 (1895).

force of arms [did] seize, carry away, and secrete the ballot box" from the eighteenth precinct of Arapahoe County.[137] Among the questions defense counsel sought to put to the venire was: "To what political party do you belong, and what were your party affiliations in November A.D. 1890?"[138] The trial judge refused to permit that question and others like it.[139] The United States Supreme Court affirmed.[140] Thus, *Connors* is sometimes read to support the view that questioning about political affiliation is disfavored.

But a closer reading shows the Court was more careful than that. *Connors* did not prohibit questioning about political affiliation. It simply held the trial court did not abuse its discretion by prohibiting defendant from asking eight questions and others of "similar import."[141] Justice Harlan first stated the general rule:

> [A] suitable inquiry is permissible in order to ascertain whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried. That inquiry is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion.[142]

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[137] *Id.* at 410.

[138] *Id.* at 412.

[139] *Id.*

[140] *Id.* at 416.

[141] *Id.* at 412. The court first sustained an objection to the question quoted in the text. *Id.* Later, defendant proposed seven written questions:

> "Q. Did you take an active part in politics in the general election of A.D. 1890; and if so, on which side?
>
> Q. Did you take an active part in the general election of A.D. 1890; and if so, with which of the parties did you affiliate, and where?
>
> Q. Have you been heretofore or are you now strongly partisan in your political belief?
>
> Q. Would your political affiliations or party predilections tend to bias your judgment in this case either for or against this defendant?
>
> Q. Were you ever at any time a member of what was and is known in the city of Denver, county of Arapahoe, and state of Colorado, as the 'Committee of One Hundred'?
>
> Q. Were you ever at any time a judge or clerk of an election; and if so, when and where, and by what party were you named and appointed?
>
> Q. Are you a member of any political club organized for the advancement of the interests of any political party; and if so, what party?"

The trial court refused to ask these as well. *Id.*

[142] *Id.* at 413.

The issue, then, was not whether political questions should be permitted, but whether the trial court "did not exercise a sound discretion in rejecting the [proposed] questions."[143] As to most of the questions, the Court found it relatively easy to determine that the trial court acted within its discretion. Since the case involved the theft of ballot boxes, it could not be said that one political party or another favored or disfavored such criminal behavior.[144] Questions designed to determine the juror's political affiliation seemed irrelevant.[145]

But the court had more difficulty with two of the questions. The defendant wished to ask: "Would your political affiliations or party predilections tend to bias your judgment in this case either for or against this defendant?"[146] The trial court acknowledged overlooking this question when it was tendered, and noted it would have permitted the question had more attention been paid.[147] Even while ruling that it was not an abuse of discretion to disallow that question, Justice Harlan preserved the possibility that it could be asked in an appropriate case:

> If the previous examination of a juror on his voir dire or the statements of counsel, or any facts brought to the attention of the court, had indicated that the juror might, or possibly would, be influenced in giving a verdict by his political surroundings, we would not say that the court could not properly, in its discretion, if it had regarded the circumstances as exceptional, have permitted the inquiry whether the juror's political affiliations or party predilections would bias his judgment as a juror.[148]

Similarly, the Court paused to consider the question regarding the Committee of One Hundred.[149] The relevance of this question to the theft

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[143] *Id.* at 414.

[144] *Id.*

[145] *Id.* at 414–15.

[146] *Id.* at 412. Compare this to the religious affiliation questions that are often permitted: "Do you have any religious, moral or ethical beliefs that would make it difficult for you to pass judgment on this or any other defendant?"(criminal case) and "Do you have any religious, moral or ethical beliefs that would make it difficult for you to decide this case in favor of either party?" (civil case). *See* FREDERICK, *supra* note 43, at 193, 203.

[147] *Connors*, 158 U.S. at 412–13.

[148] *Id.* at 415.

[149] *See id.* at 412 ("Were you ever at any time a member of what was and is known in the city of Denver, county of Arapahoe, and state of Colorado, as the 'Committee of One Hundred'?").

of the ballot boxes was not apparent from the record, but Justice Harlan intuited that there may be some connection.[150] He wrote: "If that committee was in fact behind the prosecution of the defendant, actively supplying the government with information to convict him of the crime charged, the court, without abuse of its discretion, might have allowed the question."[151]

It is useful to note Justice Harlan's larger concern. He did not want the attorneys or the court to "create the impression that the interests of the political party to which the accused belonged were involved in the trial."[152] Permitting inquiry into the juror's political affiliations could foster the impression that the case turned not on whether the specific crime was committed by the accused, but on whether a political party should be condemned.[153] Given that concern, Justice Harlan left the door open for voir dire of political affiliation in one other set of circumstances:

> If an inquiry of a juror as to his political opinions and associations could ever be appropriate in any case arising under the statute in question, it could only be when it is made otherwise to appear that the particular juror has himself by his conduct or declarations, given reason to believe that he will regard the case as one involving the interests of political parties rather than the enforcement of a law designed for the protection of the public against frauds in elections.[154]

Other cases, closely examined, show that courts often permit some questions about political activity or affiliation when they are relevant. For example, in *Gurley v. State* the defendant had been county tax collector.[155] Allegations were made that he did not turn over to the county all the funds he collected.[156] These charges were debated in the election prior to his trial.[157] John Edwards, who ran for a judgeship, supported Gurley (to the point of saying he would dismiss the charges if elected) and Gurley reciprocated.[158] Somehow, the prosecutor knew that H.W. Trigg, who was

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[150] *Id.* at 415–16.
[151] *Id.*
[152] *Id.* at 415.
[153] *Id.*
[154] *Id.*
[155] Gurley v. State, 262 S.W. 636, 637 (Ark. 1924).
[156] *Id.*
[157] *Id.* at 638.
[158] *Id.*

a prospective juror, was a supporter of Mr. Edwards.[159] So the prosecutor asked these three questions:

> Q. I will ask if you know that, during the primary election last summer a year ago, in which John Edwards was a candidate for county and probate judge, Mr. Gurley, the defendant, was enthusiastically in that election supporting John Edwards? . . .
> Q. Would the fact that Mr. Gurley was John Edwards' supporter in that election influence you in the trial of this case? . . .
> Q. You would go into the jury box and try him as though you and John Edwards were strangers, and you had never heard of the election?[160]

Over objection, the trial court permitted this questioning, and the Supreme Court of Arkansas found it did not abuse its discretion in doing so. Indeed, the court invoked the general rule that

> [t]he trial court has a discretion to permit the examination of a talesman within a range reasonably calculated to disclose whether he has such bias or prejudice . . . as is calculated to influence his verdict, and either side may ask relevant questions bearing on this subject, not only to establish actual bias . . . but [to] . . . enabl[e] the party . . . to intelligently exercise his right of peremptory challenge.[161]

It appears that the prosecutor's question was not simply a shot in the dark. Assuming there was reason to believe that Mr. Trigg might have been biased as a result of his participation in the political process, it makes sense that that prosecutor was permitted to probe.

In *State v. Maxwell*, a former chief deputy clerk was charged with forging endorsements on county checks.[162] The clerk, Pal E. Bush, made good the losses, and was to be a witness against Maxwell. Defense counsel asserted that since Bush was clerk of the court and a Catholic, (and Maxwell, his deputy, was a Protestant), he should be allowed to discover the "political and religious faith of the jurors."[163] The trial court permitted him only "to inquire, in substance, whether for any political or religious reason, the juror felt he could not serve as a fair and impartial juror, or

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[159] *See id.*
[160] *Id.*
[161] *Id.* at 638–39.
[162] State v. Maxwell, 102 P.2d 109, 111 (Kan. 1940).
[163] *Id.* at 113.

whether by reason of his religion or politics, he could not give this defendant a fair and impartial trial."[164]

The Kansas Supreme Court held that was not an abuse of discretion insofar as challenges for cause were concerned.[165] It was less clear about whether it would have ruled otherwise had defendant argued in the trial court that he needed to ask those questions to determine whether to exercise his peremptory challenges. Since that point had not been preserved below, or properly argued on appeal, the court ignored it.[166]

Another relevant case, *United States v. Chapin*, arose out of the Watergate prosecutions of members of the Nixon Administration.[167] Dwight Chapin had been the President's Appointments Secretary, a position the court described as that of a "minor functionar[y]."[168] Chapin was charged with lying to a grand jury about his knowledge of the "dirty tricks" that the White House employed to disrupt the 1972 Democratic nomination process.[169]

Chapin was concerned about the venire, since the population of the District of Columbia was overwhelmingly Democratic.[170] Although the court does not report many of the questions permitted on voir dire, it says there was an enlightening voir dire "on feelings toward the Nixon administration and those connected with it."[171] Jurors were asked "whether they believed that their own connection or that of a close friend or relative with a political party, particularly during the 1972 Presidential campaign, would prejudice them for or against the defendant and whether anyone [sic] or members of their families had worked in the 1972 campaign for the Committee to Reelect the President."[172]

The trial court did not permit certain questions, including "who jurors had voted for, which political parties they had contributed to, worked for, etc."[173] The court of appeals held this was well within the trial court's

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[164] *Id.* at 113–14.

[165] *Id.* at 114.

[166] *Id.*

[167] *See* United States v. Chapin, 515 F.2d 1274, 1277 (D.C. Cir. 1975).

[168] *Id.* at 1287.

[169] *Id.*

[170] *Id.* at 1286. Chapin also was concerned that the population of this District was "heavily black" since one of the "dirty tricks" was aimed at Shirley Chisolm, a black congresswoman seeking the Presidential nomination. *See id.* at 1284–85, 1286.

[171] *Id.* at 1286–87.

[172] *Id.* at 1289.

[173] *Id.*

discretion.[174] Indeed, it noted these questions might raise First Amendment issues.[175]

Defense counsel also sought to ask two questions about voter registration.[176] The trial court refused.[177] The court of appeals affirmed, although it had some doubts about the correctness of that ruling.[178] Since voter registration lists by party were then public records in the District of Columbia, there was less reason to deny asking those questions.[179]

In the midst of its discussion of this issue, the court of appeals took note of *Connors*, characterizing its rule as:

> [Q]uestions about political affiliation should be disallowed, even in a case involving politics, except where preliminary questioning, such as that conducted here, had indicated that a potential juror 'might or possibly would be influenced in giving a verdict by his political surroundings.' There were no such indications with regard to the jurors here.[180]

But in understanding what *Chapin* meant by this, it must be observed that the court permitted "substantial voir dire on political bias and prejudice."[181] Presumably, the court meant that questions as to a person's party membership should be disallowed except in such unusual circumstances.

It is instructive to compare *Chapin* with another Watergate case, for the difference between them shows just how much discretion trial judges are allowed, and how reluctant courts of appeals are to overturn a verdict because of claimed errors in voir dire. *United States v. Haldeman* was the prosecution of the most senior officials of the Nixon Administration.[182] The voir dire lasted eight days but focused predominantly on the effect of pretrial publicity.[183] The voir dire of one prospective juror (said to be

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[174] *See id.*

[175] *See id.*

[176] *Id.* at 1290. One can infer that at least one question asked whether the juror was a registered Democrat or Republican.

[177] *Id.* at 1289.

[178] *See id.* at 1290.

[179] *Id.* "It would even have been possible for Chapin's attorneys, armed with the list of names and addresses of veniremen, to get part of the information directly from the Board of Elections." *Id.*

[180] *See id.* (citations omitted).

[181] *See id.*

[182] United States v. Haldeman, 559 F.2d 31, 51 (D.C. Cir. 1976).

[183] *See id.* at 65.

typical) is reprinted as an appendix to the dissent. Among the questions were:

> The Court: Now, I don't want to know how you voted in any election or what your political affiliations or anything like that are, but this is a question I would like you to think about:
>
> Are you or any relative or close friend a member of any political party? By, political party, I might say, like the local Republican State Committee or Democratic Central Committee?
>
> Juror Hoffar: No, sir.
>
> The Court: Did you contribute or have you ever contributed to any political party by way of cash or a check?
>
> Juror Hoffar: Yes, sir.[184]

That line of questioning ended there.[185] Surprisingly, the judge did not pursue it.[186] The trial judge denied defense counsel's requests to ask to which party the jurors' contributions were made. Indeed, four of the jurors finally seated had "participated in or contributed to campaigns."[187]

The dissent compared this limited questioning to that which was permitted in the trial of Albert Fall in the Teapot Dome scandal.[188] It reports those jurors were asked " 'whether politics or political parties' would affect their decision."[189] The dissent also noted that the population of the District of Columbia was overwhelmingly Democratic in registration. "A pro-Democratic bias could imply presence of some anti-Republican bias and vice-versa. Such potential prejudice should certainly have been explored."[190]

The majority, however, upheld the trial court's limits on voir dire.[191] No doubt, this case falls within the rule that the trial judge has considerable discretion to conduct voir dire. Indeed, it seems unlikely that he would have been reversed had he asked more questions about political affiliation.

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[184] *Id.* at 180 app. B.

[185] *Id.*

[186] It appears the judge conducted the entire voir dire. *See id.* at 179–86. The lawyers were only permitted to ask the judge to ask questions. *Id.* at 65. *See* FED. R. CIV. P. 47(a).

[187] *Haldeman*, 559 F.2d at 160 (MacKinnon, J., dissenting).

[188] *See id.* at 159–60. *See also* Fall v. United States, 49 F.2d 506, 511 (D.C. Cir. 1931) (ruling that there was no error in the voir dire questioning).

[189] *See Haldeman*, 559 F.2d at 160–61 (MacKinnon, J., dissenting).

[190] *Id.* at 161 (MacKinnon, J., dissenting).

[191] *Id.* at 71.

Similarly, *United States v. Goland* was a criminal prosecution for "political campaign violations in connection with the race among Alan Cranston, Ed Zschau and Ed Vallen, for the United States Senate in the 1986 California election."[192] Defendant was permitted to ask jurors "whether they had voted in the 1986 election, were active in politics, had participated in any federal campaign, . . . were familiar with the FEC or federal election law," and "whether [they] supported Cranston, Zschau or Vallen in the 1986 election in a way other than voting, such as by actively campaigning or contributing campaign funds."[193]

The defendant, however, was not allowed to ask for which senatorial candidate jurors voted in the last election[194] or with which political party jurors were registered.[195] The court of appeals found "the extensive voir dire . . . adequately tested the jurors for bias or partiality."[196] It was not an abuse of discretion to refuse to permit the other two questions.[197]

Harrington v. City of Portland is an example of how a careful trial judge can handle such sensitive issues.[198] The former chief of police sued the City of Portland and a number of individuals, including the mayor, for sex-based employment discrimination.[199] Plaintiff and defendant sought to ask prospective jurors their political affiliation and for whom they voted in the most recent Portland mayoral election.[200] The court rejected this request,[201] instead allowing the following questions in open court:

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[192] United States v. Goland, 959 F.2d 1449, 1451 (9th Cir. 1992).

[193] *Id.* at 1454.

[194] *See id.* In California, an individual has a right to keep confidential the name of the candidate for whom she voted. CAL. EVID. CODE § 1050 (2003); *accord* TEX. R. EVID. ANN. § 506 (Vernon 2003).

[195] *Halderman*, 559 F.2d at 1454.

[196] *Goland*, 959 F.2d at 1454. According to the government's brief on appeal, defendant was also allowed to ask "whether 'the fact that someone supported any one of the candidates [Cranston, Zschau, or Vallen] would affect your judgment as a juror in this case' . . . as well as a host of other questions about campaign financing, involvement with campaigns, political donations or fundraising." Brief for Appellee at 48–49, *Goland*, 959 F.2d 1449 (No. 90-50423).

[197] *Id.*

[198] *See* Harrington v. City of Portland, No. 87-516-FR, 1990 WL 15688 (D. Or. Feb. 8, 1990).

[199] Ms. Harrington was the first woman police chief of a major metropolitan American city. *See* PENNY HARRINGTON, TRIUMPH OF SPIRIT 1 (1999).

[200] *Id.* Oregon's statutes contain some provisions protecting the confidentiality of the ballot; however, they do not expressly prohibit asking this question. *See* OR. REV. STAT. § 260.695 (2001).

[201] *Harrington*, 1990 WL 15688 at *1.

> 1) Are you or any close family members actively involved in politics—as political candidates, political advisors, or political party executives or workers? If so, please advise the court of your political activities.
>
> 2) Are you now—at this time—actively involved in any organizations—for example, professional or business organizations?—or social or educational organizations?—or political organizations? Please advise the court about the organization and your involvement? [sic][202]

In individual, sequestered voir dire, the judge then asked each juror questions including:

> 1) Do you have any opinion about Bud Clark's overall performance as Mayor of the City of Portland? Do you recall any actions he has taken as Mayor that would interfere with your ability to listen to the evidence in this case, apply the law as given to you by the court, and render a fair and impartial decision?
>
> 2) Have you been an active supporter or opponent of Mayor Clark?
>
> 3) Would the fact that you voted for Mayor Clark, if you did, or the fact that you did not vote for Mayor Clark, if you did not, influence your ability to listen to the evidence in this case, apply the law as given to you by the court, and render a fair and impartial decision?[203]

The court concluded "[t]hese questions will adequately address the possible influences of politics upon prospective jurors and will avoid possible first amendment problems."[204]

Thus, it appears that in political corruption cases, courts are willing to permit some inquiry into the possibility that a juror's decision might be affected by his political affiliation or involvement. Some courts have permitted only conclusory questions.[205] Others have permitted significantly

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[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] *See, e.g.*, United States v. Furey, 491 F. Supp. 1048, 1054–55 (E.D. Pa. 1980) (asking, in a bribery case involving a local tax assessor, whether there was "any other factor that [the jury] believed could prevent them from being fair and impartial jurors"); State v. Maxwell, 102 P.2d 109, 113–14 (Kan. 1940) (asking only if the jurors "whether, by reason of [their] religion or politics, [felt they] could not give this defendant a fair and impartial trial"). Although the trial judge in *Furey* said in "prejudices and biases, possibly as to political figures in general, is a permissible area for voir dire examination," it permitted less inquiry than some of

more extensive inquiry.[206] More often than not, it appears that courts will allow neutral questioning regarding a juror's level of involvement in politics and whether his political beliefs will affect his judgment.[207]

It can be inferred, then, that if there were a case brought by or against the Democratic or Republican Party, a court would permit inquiry into whether prospective jurors were active in party affairs to such an extent that they might have a disqualifying bias.[208]

B. Times of Deep Political Controversy

There have been times in our history when political and social movements divided the polity deeply. From the late nineteenth to the midtwentieth century, the labor movement,[209] anarchism, socialism, and

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the other cases noted above. *See Furey*, 491 F. Supp. at 1053–55.

[206] *See, e.g., Harrington*, 1990 WL 15688 at *1.

[207] For a useful discussion of how these issues may play out in a trial, and what voir dire might be helpful in disclosing bias, see V. HALE STARR & MARK MCCORMICK, JURY SELECTION § 11.7.2, at 493–95 (2d ed. 1993).

[208] *Cf.* Congregation of the Passion v. Touche Ross, 636 N.E.2d 503, 516–17 (Ill. 1994); (recognizing that interaction with a religious organization may create prejudice that would be appropriate to disqualify a venireman) Hornsby v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints, 758 P.2d 929, 931 (Utah Ct. App. 1988) (acknowledging that voir dire inquiry into religious activity, where a religious organization is a party is appropriate).

[209] Possible prejudice for or against union members and leaders has given rise to a separate line of cases. *See, e.g.*, State v. Stafford, 109 S.E. 326 (W. Va. 1921) (involving a criminal prosecution of a union leader charged with shooting at non-union workers during a contentious strike at a mine). In *Stafford*, the defense counsel sought and was permitted to ask a number of questions to determine if jurors would be prejudiced against defendant because he was an officer of the United Mine Workers. *Id.* at 331. In *United States v. Hoffa*, 367 F.2d 698 (7th Cir. 1966), the federal government prosecuted the President of the Teamsters Union and several others for mail and wire fraud in the administration of the union's pension fund. *Id.* at 701–02. Prior to the trial, there had been a history of "public clashes" between Robert Kennedy, who was then the Attorney General, and defendant Hoffa. Defendants sought to ask prospective jurors about their "political affiliations" and whether they had "ever crossed a Teamsters picket line." *Id.* at 710–11. The trial court refused and the Seventh Circuit affirmed. *Id.* at 710. The appellate court noted that jury selection lasted ten days, and more than five hundred veniremen were questioned. *Id.* at 710–11. While the court does not report what was included in the questioning, it held that the trial court acted within its discretion in "foreclosing inquiries which seemed to be of a dilatory nature." *Id.* at 710. The trial court's ruling in the famous *Sacco* case is also illustrative of voir dire

communism each had their turns. Later, the Vietnam War created similar passions.

These divisions concern the judiciary. Recall Hamilton's defense of an independent judiciary as "an essential safeguard against the effects of occasional ill humors in the society."[210] These divisions also concern trial advocates. In many cases, the connection is quite direct: an anarchist, socialist, labor leader, or antiwar protester is on trial. In other cases, the connection is more tenuous, but one side or the other seeks to insinuate, by voir dire, that a party is a member of a disfavored group. *Ex parte Spies* is an early example of this class of case.[211] It arose out of the May 4, 1886 Haymarket riot in Chicago. The Knights of Labor, trade unions, socialists, and anarchists were striking for an eight-hour day. In the riot, eight policemen were killed and sixty-seven people were wounded.[212] During voir dire, the prosecutor had the following exchange with a juror:

> Q. Are you a socialist, a communist, or an anarchist?
> A. No, sir.
> Q. You have no associations or affiliations with that class of people, as far as you know?
> A. No, sir.[213]

No objection was made.[214] Indeed, it is reported that defense counsel asked essentially the same question of another juror, but it is clear that defense counsel's concern was the same as Justice Harlan's in *Connors*:

> Q. You are not a socialist, I presume, or a communist?
> A. No, sir.
> Q. Have you a prejudice against them from what you have read in the papers?

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concerning labor unions. *See* Commonwealth v. Sacco, 151 N.E. 839 (Mass. 1926). In *Sacco*, the defense counsel asked the court to inquire on voir dire: "Is the juror an employer of labor? If the juror is an employer of labor, does he employ union help when union help is available? If the juror is an employee, is he a member of any union? Is the juror opposed to organized labor?" *Id.* at 848.

[210] THE FEDERALIST NO. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[211] *See Ex parte* Spies, 123 U.S. 131 (1887).

[212] 3 SAMUEL ELIOT MORRISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 82 (1994).

[213] *Spies*, 123 U.S. at 174.

[214] *Id.* at 179.

> A. Decided.
> Q. A decided prejudice against them? Do you believe that that would influence your verdict in this case, or would you try the real issue which is here, as to whether these defendants were guilty of the murder of Mr. Degan or not, or would you try the question of socialism or anarchism, which really has nothing to do with the case? . . .
> Q. Now, the issue, and the only issue, which will be presented to this jury, unless it is presented with some other motive than to arrive at the truth, I think is, did these men throw the bomb which killed Officer Degan? . . . Now, that is all there is in this case,—no question of socialism or anarchism to be determined, or as to whether it is right or wrong.[215]

Note that the trial judge permitted direct inquiry into the potential juror's political affiliation. Each side seems to have believed the question relevant, so neither appears to have objected.[216]

Compare that, though, with three California cases. The first, *People v. Warr*, involved a crime that may have been politically motivated.[217] On November 19, 1912, defendant entered the Los Angeles Central Police Station wearing a yellow mask and green goggles and carrying sixty sticks of dynamite wired to explode.[218] He demanded to see the "highest official of a railroad company" in the city.[219] At trial, seeking to link defendant to anarchists or communists,[220] the prosecutor asked jurors "whether they believed in the doctrine of members of a certain political party known as 'direct action,' which signified that physical force was approved as a means to secure desired ends."[221] The trial court overruled an objection to these questions and the court of appeal affirmed, saying:

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[215] *Id.* at 176. The outcome of the appeal did not turn on this. The Court determined that an Illinois statute governing bias did not preclude a fair trial for the defendants. *Id.* at 179–80. Their convictions were affirmed. *Id.* at 182.

[216] By contrast, there have been other cases in which both sides wished to know a juror's political affiliation, but the trial judge refused to permit such inquiry. *See, e.g.*, Harrington v. City of Portland, No. 87–516–FR, 1990 WL 15688 (D. Or. Feb. 8, 1990); United States v. Serafini, 57 F. Supp. 2d 108, 113 (M.D. Pa. 1999).

[217] People v. Warr, 136 P. 304, 305 (Cal. Dist. Ct. App. 1913).

[218] *Id.*

[219] *Id.*

[220] In *People v. Fitzgerald*, 58 P.2d 718, 730 (Cal. Dist. Ct. App. 1936), the California Court of Appeals said "it is a matter of common knowledge that the [Communist] party . . . believes in 'direct action' in the settlement of controversies, and not in judicial determinations."

[221] *Warr*, 136 P. at 306.

> It was not shown that defendant belonged to the particular political party referred to, and the questions should be considered only as requiring the veniremen to say whether they believed a person justified in using physical force in redressing his own injuries, real or fancied. The questions were proper in order that the matter of actual bias, if any existed in the minds of the prospective jurors, should be brought out.[222]

The other two cases arose out of one criminal incident: *People v. Fitzgerald*[223] and *People v. Buyle*.[224] During the Depression, maritime labor unions on the West Coast joined together to strike the San Francisco waterfront. Management brought in nonunion replacement workers. Defendants stole dynamite from a quarry and set out to blow up the hotel in which nonunion workers were staying. Fitzgerald and Buyle were tried separately.[225]

In *Fitzgerald,* on voir dire, the prosecutor asked whether jurors had "any connection with the Communist party."[226] Although there was no evidence that defendants were Communists (or that Communism was somehow relevant to the charges)[227] the trial judge permitted the questioning and the appellate court affirmed.[228] The sole basis for the ruling was that "it is a matter of common knowledge that the party named believes in

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[222] *Id.*

[223] *See Fitzgerald*, 58 P.2d at 721–23.

[224] *See* People v. Buyle, 70 P.2d 955, 957 (Cal. Dist. Ct. App. 1937).

[225] *Fitzgerald*, 58 P.2d at 721–23.

[226] *Id.* at 730.

[227] *Fitzgerald* and *Buyle* involved a strike by waterfront unions in March and April 1935. See *id.* at 721; *Buyle* 70 P.2d at 957. That followed, by only a few months, the famous 1934 strike of the San Francisco waterfront, which evolved into a general strike. Kevin Starr, the eminent California historian, describes the 1934 strike in *Endangered Dreams*. *See* KEVIN STARR, ENDANGERED DREAMS 119 (1996). Although Starr concludes the strikers were not led by Communists, he reports there was a "universal resort to a Red Scare by management and key government officials." *See id.* ("Both [San Francisco] Mayor Rossi . . . and Governor Merriam . . . made radio addresses blaming the general strike on Communists." *Id.* at 116. The 1934 strike was settled by an arbitrator's award on October 12, 1934. *Id.* at 118. Despite the settlement, however, labor unrest continued on the San Francisco waterfront. *See* JEREMY BRECHER, STRIKE! 176–77 (1997). The same unions which were part of the 1934 general strike were involved in the "Tankers Strike" of 1935. *Fitzgerald*, 58 P.2d at 721. Thus, there was a serious risk that prospective jurors in *Fitzgerald* and *Buyle* would associate the strikers with communism.

[228] *Fitzgerald*, 58 P.2d at 730.

'direct action' in the settlement of controversies, and not in judicial determinations. If this were developed, bias and prejudice might well bar the prospective jurors from serving."[229] Of course, the trial court could have directed the attorneys to inquire on that point without mentioning the Communist Party, rather than risk inclining the jurors to guilt by association.[230]

In *Buyle*, too, the prosecutor asked several prospective jurors whether they were members of the Communist Party.[231] The trial court repeatedly admonished the jurors that communism was not an issue but permitted the questions.[232] The prosecutor argued that communists might think defendants' acts were excusable and therefore communists should be removed from the jury.[233]

Despite this argument, it appears the prosecutor's real objective was to paint defendants with a communist brush, for he included the charge of communism in his closing argument, bringing forth another admonition from the judge. Nonetheless, the California Court of Appeal affirmed by saying,

> [I]n order to ascertain whether a juror is prejudiced in a particular case it has always been held proper to inquire as to his membership in any political, religious, social, industrial, fraternal, law-enforcement, or other organization whose beliefs or teaching would prejudice him for or against either party to that case.[234]

The rationale of these cases seems flimsy. If the object of the prosecutor was to determine if the jurors believed violence is an acceptable mode of redress, he could have asked that question, rather than inquiring about membership in an unpopular party. It seems more likely the prosecutor was seeking to link defendant to a politically disfavored group, and was only trying to precondition the jurors to convict. The trial judges in these

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[229] *Id.*

[230] *Compare id.* (allowing a more general voir dire question that could associate potential jurors to a more specific bias) *with Connors v. United States*, 158 U.S. 408, 415 (limiting general voir dire questions on political affiliation to cases where the juror views the interests of political parties more than the enforcement of law).

[231] *Buyle*, 70 P.2d. at 957.

[232] *Id.*

[233] *Id.*

[234] *Id.*

California cases stoked, rather than dampened, the "occasional ill humors in society."

They are not alone. In *United States v. Lebron*, Puerto Rican nationalists were charged with conspiracy to overthrow the United States government.[235] The conspirators' acts included the attempted assassination of President Truman and the wounding of five Congressmen on the floor of the House of Representatives. All were members of the Nationalist Party of Puerto Rico.[236]

At voir dire, the trial judge permitted the prosecutor to give each juror a mimeographed list of "subversive organizations" that included the Nationalist Party of Puerto Rico, "the Communist Party and various groups regarded as Communist 'fronts' and satellites."[237] The purpose appears to have been to create an impression of guilt by association. Reluctantly, the court of appeals stated "[a]though we do not endorse the practice . . . , we cannot say that [the trial judge] abused his discretion in this case . . . . We suggest, however, that this practice be not again employed."[238]

Sometimes it is the defendant who wishes to make inquiry. For example, in *Ruthenberg v. United States* three World War I-era socialists were charged with aiding, abetting, and inducing another to fail to register for the draft.[239] Defendants sought to ask veniremen "whether they distinguished between socialists and anarchists."[240] The trial judge refused. The Supreme Court affirmed in an opaque sentence which simply referred to prior decisions, including *Spies*.[241] Perhaps the reference was to the considerable discretion afforded trial judges. In any event, the political questions seemed only tangentially relevant to the crime.[242]

The Supreme Court showed more solicitude during the McCarthy era when politically unpopular defendants sought to ask about jurors' political views so they might better select an impartial jury. For example, *Morford*

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[235] United States v. Lebron, 222 F.2d 531, 533 (2d Cir. 1955).

[236] *Id.*

[237] *Id.* at 536.

[238] *Id.*

[239] Ruthenberg v. United States, 245 U.S. 480, 481 (1918).

[240] *Id.* at 482. Presumably, they believed the popular opinion of anarchists was lower than that of socialists.

[241] *Id.*

[242] The *Ruthenberg* Court also dismissed a claim that defendants were deprived of a fair trial because the grand and petit juries were "composed exclusively of members of . . . political parties [other than the Socialist Party] and of property owners." *See id.* at 481–82. *But see* Thiel v. S. Pac. Co., 328 U.S. 217, 225 (1946) (holding the systematic exclusion of wage earners unconstitutional).

v. United States involved the prosecution of the Executive Director of the National Council of American-Soviet Friendship, Inc. for failing to comply with a subpoena issued by the House of Representatives' Committee on Un-American Activities.[243] The Truman Administration had recently issued a "Loyalty Order" which raised a question of whether federal employees might be criticized, sanctioned or even fired for serving on a jury that acquitted a Communist.[244] Morford sought, unsuccessfully, to ask government employees in the venire whether that might influence their judgment.[245] The Supreme Court reversed his conviction, saying the trial court deprived defendant of the opportunity to prove actual bias on the part of the jurors.[246] It referred, with approval, to the questions permitted in *Dennis v. United States* on the same subject.[247]

But unpopular defendants did not always fare so well during the post-war period. Eugene Dennis was the General Secretary of the Communist Party of the United States.[248] He was prosecuted not only for refusing to testify before the House Un-American Activities Committee, but also for violation of the Smith Act,[249] which made it a criminal offense to teach and advocate the overthrow of the American government by force or violence.[250] The Smith Act prosecution was a highly contentious affair. There was "heated public feeling against Communists."[251] The trial judge asked prospective jurors several questions directed to those passions. Unfortunately, some of the questions were compound and turgid. For example, jurors were asked:

> Have you at any time been a member of, made contributions to, or been associated in any way with business or religious organizations, or organizations of any character, whose officers or representatives have made any expressions of advocacy of or friendliness toward Communists or Communism in general, on the one hand, or of opposition or hostility to Communists or Communism in general on the other hand, which expressions you have heard or read in any manner, which have led you to form any opinions or impressions as to the merits of the charge, unfavor-

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[243] Morford v. United States, 339 U.S. 258, 258–59 (1950).
[244] Exec. Order No. 9835, 12 Fed. Reg. 1935 (Mar. 21, 1947).
[245] *Morford*, 339 U.S. at 259.
[246] *Id.*
[247] *Id.* (citing Dennis v. United States, 339 U.S. 162, 170–71 n.4 (1950)).
[248] *Id.* at 164.
[249] The Alien Registration (Smith) Act, 18 U.S.C. § 2385 (2003).
[250] United States v. Dennis, 183 F.2d 201, 205 (2d Cir. 1950).
[251] *Id.* at 226.

> able either to the Government or to the defendants, or any of them, which would prevent you or hinder you from holding your mind fully open until all the evidence and the instructions of the Court are complete?[252]

The Court asked other questions to determine whether (1) the jurors' affiliations caused them to have any views on the merits of the case, (2) they could give equal weight to the testimony of a Communist, and (3) they would be "embarrassed" at their jobs, church, political party, or other social group if they rendered a verdict of not guilty.[253]

Still, defendants complained that the court failed to ask ten specific questions—each of which was less complicated than those asked by the court, and each of which would have probed more directly and deeply the jurors' political views.[254] For example, defendants would have asked: "Do you believe that a member of the Communist Party cannot be a loyal citizen of the United States?"[255]

Judge Learned Hand affirmed the conviction. He noted that voir dire in the case consumed eight days.[256] Although recognizing that the trial judge's questions were less than crisp, he excused them in light of the imperfections of voir dire:

> It is of course true that any examination on the voir dire is a clumsy and imperfect way of detecting suppressed emotional commitments to which all of us are to some extent subject, unconsciously or subconsciously. It is of the nature of our deepest antipathies that often we do not admit them even to ourselves; but when that is so, nothing but an examination, utterly impracticable in a courtroom, will disclose them . . . . No such examination is required . . . . If trial by jury is not to break down by its own weight, it is not feasible to probe more than the upper levels of a juror's mind.[257]

Note, the issue was not whether some political affiliation questioning was proper; only how much. Given the discretion afforded to trial courts, Judge Hand held the questions asked were enough.

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[252] *Id.* at 227 n.35.

[253] *Id.*

[254] *Id.* at 226–27.

[255] *Id.* at 226 n.34.

[256] *Id.* at 227.

[257] *Id.* Many years before, Judge Hand opined that the "length and particularity" of counsel-conducted voir dire in criminal cases "had become a scandal and required some effective control." *See* Falter v. United States, 23 F.2d 420, 426 (2d Cir. 1928).

Political unrest in the 1960s and 1970s gave rise to similar cases. One of the most notorious was *United States v. Dellinger*.[258] That case arose out of the antiwar demonstrations at the Democratic National Convention in Chicago in August 1968.[259] As the court recites in its opinion, the times were tumultuous; the country was becoming divided over the Vietnam War.[260] Several men (the so-called "Chicago Seven") were prosecuted for violations of the federal Anti-riot Act[261] in connection with those demonstrations.[262] At voir dire, the defendants tendered a list of questions that sought to inquire, among other things, into the prospective jurors' attitudes toward "dissent and public protest against the Vietnam war."[263] The trial court refused to allow this, and the Seventh Circuit reversed.[264] The appellate court cited the "deep divisions in our society resulting from that war" and noted that "[a]nti-war activists, such as these defendants, have . . . challenged the validity of a concept of patriotism."[265] It wrote: "We do not believe that the court could safely assume, without inquiry, that the veniremen had no serious prejudice on this subject, or could recognize such prejudices and lay them aside."[266]

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[258] United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972).

[259] *Id.* at 348.

[260] *Id.* at 368–69.

[261] Anti-riot Act, 18 U.S.C. § 2101 (2003).

[262] *Dellinger*, 472 F.2d at 348.

[263] *Id.* at 370.

[264] *Id.* at 409.

[265] *Id.* at 368.

[266] *Id.* Other Vietnam-era cases required trial judges to grapple with similar issues. One such case is *United States v. Mattin*, 419 F.2d 1086 (8th Cir. 1970), a Vietnam-era prosecution of one who refused to register for the draft. The trial judge conducted the voir dire, in which he asked a number of questions designed to elicit prospective jurors' political views about the Vietnam War, the draft, and conscientious objection. On appeal, the defendant argued more questions should have been asked, but the Eighth Circuit disagreed. Clearly it was within the trial court's discretion to ask such things. *Id.* at 1088; *see also* United States v. Giese, 597 F.2d 1170, 1182–83 (9th Cir. 1979) (holding that the trial court properly asked jurors about Vietnam War protests and was within its discretion in prohibiting questions about President Ford's conditional amnesty plan or his pardon of President Nixon because "it was essential for the trial judge . . . to examine prospective jurors' attitudes toward appellant and the views he represented" in the prosecution of a war protestor who bombed a Navy recruiting center); United States v. Owens, 415 F.2d 1308, 1314–15 (6th Cir. 1969) (holding that the trial judge properly asked each juror if he "possesses such strong opinions about the international involvement of the United States that he feels that such opinion would

A case from a time when post-Vietnam politics had become a bit stale attempted to state a general rule. In *Cordero v. United States*, the defendant was undergoing a prosecution for disrupting Congress.[267] In May 1979, defendant stood in the Senate gallery, threw leaflets and shouted about "the third world war," "revolution," and "the killing of people in Vietnam."[268]

At trial, defendant proposed asking questions designed to determine jurors' attitudes towards Vietnam Veterans Against the War and the Revolutionary Communist Party.[269] The defendant was apparently a member of both organizations.[270] He also proposed the following questions:

> [Appellant] is accused of throwing leaflets into the Senate Gallery and making a speech which in essence denounced the United States and other countries for planning World War III. How many of you would characterize your own feelings as being in complete disagreement with those expressed in [appellant's] speech . . . ? Having those feelings, would it be difficult for you to be completely fair and impartial in sitting as a juror in this case? . . .
>
> Have any of you . . . ever been a member of any organization which had as one of its objectives opposition to Communism?[271]

The trial court refused to ask these questions, but the court of appeals reversed. It set forth the following rule:

> Fairness requires a careful voir dire examination when there is a "significant likelihood" of juror prejudice . . . . A significant likelihood

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prevent him from giving a fair and impartial trial under the law and the evidence to both the United States and to the defendant, either way"); United States v. Malinowski, 347 F. Supp. 347, 355 (E.D. Pa. 1972) (permitting the inquiry "about any prejudice which would exist because of defendant's motives, but did not ask detailed questions about "jurors' views on the Indo-China conflict and on civil disobedience" in a prosecution of a war tax protestor), *aff'd*, 556 F.2d 542 (3d Cir. 1973); Commonwealth v. Harrison, 331 N.E.2d 873, 874 (Mass. 1975) (sustaining the trial court's refusal to ask certain questions, but noting that it would likely have sustained the trial court if it had asked them), *aff'g* 321 N.E.2d 672 (Mass. App. Dec. 1975).

[267] Cordero v. United States, 456 A.2d 837, 839 (D.C. App. 1983).

[268] *Id.* at 839–40.

[269] *Id.* at 843–44.

[270] *Id.* at 840.

[271] *Id.* at 843–44 (quoting defendant's proposed questions in voir dire) (alterations in original).

> of prejudice exists when (1) a case involves "matters concerning which either the local community or the population at large is commonly known to harbor strong feelings" . . . and (2) these matters are "inextricably bound up with the conduct of the trial."[272]

Since appellant's political views were inextricably bound up in the trial of the case, and the community was said to harbor strong feelings about the Revolutionary Communist Party, it was incumbent on the trial court to conduct voir dire on the subject.[273]

Although the court reached the correct conclusion in *Cordero*, its statement of the law is too limiting. Suppose a case that involves "matters concerning which [the venire] is commonly known to harbor strong feelings."[274] A party should be able to probe those "strong feelings" for bias, regardless of whether they are "inextricably bound up with the conduct of the trial."[275] A party who is a member of a disfavored group (and

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[272] *Id.* at 841–42 (citing Rosales-Lopez v. United States, 451 U.S. 182 (1981); Ristaino v. Ross, 424 U.S. 589 (1976); United States v. Robinson, 475 F.2d 376 (D.C. Cir. 1978); United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972)).

[273] For other examples of cases in which political affiliation questions were permitted, see GINGER, *supra* note 4, § 9.17, at 525.

In a similar vein, a criminal defendant may be politically unpopular for other reasons. For example, Terry Nichols was tried and convicted of blowing up the Murrah Federal Building in Oklahoma City in 1995. A lengthy questionnaire was administered to the jurors. During follow-up voir dire, the following exchange went unchallenged:

> Q. Now let me ask a few questions from the information you supplied on the questionnaire. You indicated in your questionnaire that you—you've listened to Rush Limbaugh and Peter Boyles?
>
> A. Yes, I do.
>
> Q. Now, where you put—on a political scale of zero to 100, hundred being most conservative, zero being least conservative, where would you put Rush Limbaugh?
>
> A. 75, 80.
>
> Q. Where would you put yourself?
>
> A. 65, 70.

Criminal Lawyers Ass'n., *American Jury Voir Dire Questioning*, FOR THE DEFENCE Oct. 1997, http://www.criminallawyers.ca/newslett/18-6/nichol.htm. The original transcripts can be found at The Oklahoma City Bombing Trial Transcripts, http://www.courttv.com/casefiles/oklahoma/transcripts/ (last visited Feb. 5, 2004).

[274] *Cordero*, 456 A.2d at 842.

[275] *Id.*

whose status will become evident at trial) is entitled to trial by an impartial jury. The fact that the disfavored status is not "inextricably bound up with the conduct of the trial" (whatever that means) does not justify seating biased jurors.[276]

There is a converse concern. As can be seen, the temper of the time may sometimes have more effect on these decisions than it should. In the Depression-era labor cases,[277] and in the Puerto Rican assassins' case,[278] the trial court permitted questions that seemed designed more to sow notions of guilt by association than to inform the parties for purposes of jury selection. In times when there is popular animus toward certain political organizations, great care must be taken to prevent voir dire from being used improperly to try to prejudice the jury against a member of a disfavored group. Care must be taken to insure that both parties have trial by a jury as "indifferent" as may be possible under the circumstances.

C. *Ordinary, Nonpolitical Cases*

What about the usual case that involves neither political corruption nor an unusually heated political climate? Is it permissible to inquire as to a juror's party affiliation or political activities? The answer resides largely in the discretion of the trial court. It appears that courts are more willing to permit such inquiry in questionnaires than in live voir dire, but even that is not universally true.

1. *Questionnaires*

There is considerable evidence that courts have permitted such inquiry through the medium of questionnaires administered to potential jurors. Also the lengthy juror questionnaire in the notorious O.J. Simpson trial included several specific political questions, including:

> 202. What is your political affiliation? (Democrat, Republican, Independent)
> 203. Are you currently registered to vote?

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[276] *Id.* If the case did not involve "strong feelings" then the threshold for permitting inquiry should, of course, be lower. Similarly, if the political affiliation of the party is not likely to become evident during the trial, there is probably no reason to inquire.

[277] *See supra* notes 223–34 and accompanying text.

[278] *See supra* notes 235–38 and accompanying text.

204. Did you vote in the June, 1994 primary elections?
205. Do you consider yourself politically (active, moderately active, inactive)?[279]

Similarly, *Brandborg v. Lucas* arose out of a murder trial.[280] Brandborg was called for jury duty and was asked to complete a questionnaire that included a number of questions she considered intrusive.[281] Among them were "With which political party are you primarily associated?" and "Do you consider yourself a liberal, a conservative or a moderate?"[282] The Texas trial court permitted those questions to be asked, but Brandborg refused to answer them and eleven others. The trial court held her in contempt and the Texas Court of Criminal Appeals denied her application for a writ of habeas corpus.[283]

Brandborg filed a habeas petition in the United States district court, alleging a violation of her constitutional right to privacy. The federal court was clearly troubled by the case. Concerned about Brandborg's privacy, it nonetheless acknowledged that "pieces of the information sought with regards to . . . political affiliation . . . were discernable [sic] from public records."[284] While faulting with the trial court for failing to conduct a sufficient balancing of the need for disclosure versus the value of juror privacy, the Texas appellate court did not hold the questions were necessarily improper.[285] It vacated the contempt finding, however.[286]

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[279] California v. Simpson, Juror Questionnaire, No. BA097211, 1994 WL 564388 at *18–19 (Cal. App. Dep't Super. Ct. Doc. Oct. 3, 1994).

[280] Brandborg v. Lucas, 891 F. Supp. 352, 353 (E.D. Tex. 1995).

[281] *See id.*

[282] *Id.* at 354 Other questions included "What was your combined family income last year?," and "Religious preference (please name denomination and specific church you attend)." *Id.*

[283] *Id.* at 355.

[284] *Id.* at 359.

[285] *See id.*

[286] *See id.* at 361.

> Petitioner was not advised that private matters could have been discussed *in camera*. In addition, the relevance of the specific questions at issue was never considered or established. The trial court's failure to determine the relevance of the questions and conduct a balancing test of the competing interests, entitled the petitioner to refuse to answer. However, a potential juror is certainly not free to refuse to answer any question propounded when it is found by the court to be relevant, or potentially relevant, and a balancing of the competing interests is performed.

Id.

United States v. Battle was a prosecution for the murder of a prison guard.[287] The trial court permitted extensive voir dire that included group questioning, individual (sequestered) voir dire, and a written questionnaire. The questionnaire asked: "Would you describe yourself politically? Pick the spot on the scale which seems correct:" The numbers one though six were printed, with "1" denoting "Extremely liberal" and "6" denoting "Extremely conservative."[288]

Other trial courts have exercised their discretion to prohibit these kinds of questions. *United States v. Padilla-Valenzuela* was a case in which defendant was charged with possession with intent to distribute more than a ton of cocaine.[289] At the time of his arrest, defendant was illegally in the United States.[290] Defense counsel submitted a proposed voir dire questionnaire that sought to probe jurors' attitudes towards federal immigration policy and immigrants.[291] It asked whether the respondent has "ever used derogatory language in referring to members of a minority group"[292] or has "ever been a member of any racially-exclusive clubs or clubs where even though not avowedly discriminatory—there are no minority members."[293] Counsel also filed a "Motion for Attorney Conducted Voir Dire," telling the court he wanted "to explore the 'anti-immigrant fervor' of prospective jurors."[294] The court found all this to be too sweeping an intrusion into the privacy rights of the jurors. It refused to administer the questionnaire or permit counsel to conduct the interrogation.[295]

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[287] United States v. Battle, 979 F. Supp. 1442, 1445 (N.D. Ga. 1997).

[288] *Id.* at 1474. The questionnaire also asked for a list of organizations (including political) to which the juror or his spouse belonged, whether the juror was a member of the National Rifle Association "or any other organization which is concerned with protecting the right to own weapons," and information about the juror's religious affiliation. *Id.* at 1472–73.

[289] United States v. Padilla-Valenzuela, 896 F. Supp. 968, 969 (D. Ariz. 1995), *aff'd*, No. 96-10214, 1997 U.S. App. LEXIS 10,661, at *7 (9th Cir. May 7, 1997).

[290] *Id.*

[291] *See id.*

[292] *Id.* at 969.

[293] *Id.*

[294] *Id.* at 970.

[295] *See also* United States v. Serafini, 57 F. Supp. 2d 108 (M.D. Pa. 1999). In a perjury prosecution against a state legislator, the court approved the use of a questionnaire. *Id.* at 111. While it struck from the questionnaire "what political party or political organizations do you belong to?" it permitted questions regarding membership in environmental or conservation organizations, contributions of time, services, or money to political campaigns, activity in political campaigns, contributions to defendant's political campaigns, and attendance at political events

2. *Oral Voir Dire*

Courts have also split on whether to permit oral voir dire regarding political affiliation in a nonpolitical trial.

In United States v. Gonzalez-Quezada a previously deported alien was convicted of having again been found in the United States.[296] According to the Ninth Circuit, the defendant "sought to eliminate members of the Republican Party from the jury because of their racist attitudes and anti-affirmative action and immigration views."[297] The district court "asked broad questions regarding the jurors' views on immigration, political affiliations, and racial and cultural bias,"[298] but it refused to ask certain questions tendered by defendant "regarding the jurors' political party affiliations and views on affirmative action and immigration."[299] The appellate court held there was no an abuse of discretion in the manner in which the district court conducted voir dire.[300]

Similarly, *Samples v. State* was an armed robbery prosecution.[301] The defendant sought to question potential jurors about the extent of their political activity. Noting the request was based only on his "bare assertion that the question was designed to reveal a pro-prosecution bias, without support in logic, common experience, or authority,"[302] the Georgia Court of Appeals affirmed the trial court's refusal to permit defendant to ask about political activity.[303]

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in support of defendant. *See id.* at 113–16. By comparison, in the trial of Oliver North, arising out of the Iran-Contra political controversy, the questionnaire asked only "Are you a registered voter?" and "Have you, or has any member of your immediate family, ever had an elected or appointed office in state, federal, or local government?" It did not ask party affiliation or voting history. *See* Juror Questionnaire for *United States v. North*, *reprinted in* FREDERICK, *supra* note 43, at 216.

[296] *See* United States v. Gonzalez-Quezada, No. 96-10092, 1997 WL 119501, **1 (9th Cir. Mar. 11, 1997).

[297] *Id.* at **2.

[298] *Id.*

[299] *Id.*

[300] *Id.* The Ninth Circuit noted that "[s]pecific voir dire questions are needed to ward off prejudice in cases with racial overtones, involving well-known community matters about which the local community population feels strongly, and involving other forms of bias and distorting influence." *Id.*

[301] Samples v. State, 460 S.E.2d 795, 796 (Ga. Ct. App. 1995).

[302] *Id.* at 797.

[303] *Id.* The Court affirmed the trial court's decision despite Georgia's jury selection statute that extends to both parties the "absolute right to question jurors regarding certain matters, including their 'religious, social and fraternal

Texas has permitted counsel to ask jurors their political affiliation in an appropriate case. *Lopez v. Allee* was a civil case in which the defendant was charged with assault and battery.[304] The plaintiff was a young Mexican-American; the defendant was a retired Texas Ranger.[305] The altercation occurred when plaintiff was serving defendant in a convenience store. The case seems to have taken on larger, political overtones. During voir dire, the defendant's counsel asked a juror, Mrs. Maria Elva Navarro, "if she belonged to or sympathized with La Raza Unida," which, the court explains, is a "recognized political party."[306] Plaintiff objected because the party had nothing to do with the case, but the court permitted the question.[307] Then, the plaintiff's counsel asked the La Raza Unida question of some jurors with Anglo names, and the defendant's counsel asked the question of some with Mexican-American names.[308]

The appellate court affirmed the trial court's decision to permit the question.[309] It explained that even though the political party had no connection with the suit "both parties apparently assumed that members of such party or those in sympathy with its cause would be prejudiced towards appellant, and that those not in sympathy with La Raza Unida, or its cause, would be prejudiced in favor of appellee."[310] It cited the testimony of one prospective juror, a member of La Raza Unida, who said although he had no prejudice against appellee, "most members . . . did have such prejudice."[311] In effect, then, the court allowed membership in the party to be taken either as a surrogate measure of bias or as an indication of whether to ask further questions on the juror's ability to focus only on the evidence.

Sometimes a court is sensitive to keep out an issue, only to have counsel open the door to it. For example, *Sell v. C.B. Smith Volkswagen* was a garden-variety personal injury action involving a blown tire.[312] The accident, however, occurred while plaintiffs were returning from a Socialist

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connections.' " *Id.* (quoting GA. CODE ANN § 15–12–133 (1995)). The court noted the statute does not expressly include political activity, and declined to read the statute broadly. *See id.*

[304] Lopez v. Allee, 493 S.W.2d 330, 332 (Tex. Civ. App. 1973).

[305] *Id.* at 333.

[306] *Id.* at 334.

[307] *Id.*

[308] *Id.*

[309] *Id.* at 336.

[310] *Id.* at 335.

[311] *Id.*

[312] Sell v. C.B. Smith Volkswagen, Inc., 611 S.W.2d 897, 899 (Tex. Civ. App. 1981).

Workers Party convention.[313] So the plaintiffs' attorney filed a motion in limine precluding the defendant from offering proof that the plaintiffs were Socialists.[314] Nonetheless, during voir dire, that attorney told the jurors that the evidence would show that one of the plaintiffs was very active in politics and organizing and asked if anyone would hold it against her. When a prospective juror asked, " 'What kind [of organizing], I mean for our government or against our government?,' the attorney replied, 'for our government, I can assure you . . . .' "[315]

Later in the trial, defense counsel sought to cross-examine plaintiff on the truth of that statement. The trial court permitted it, and the appellate court affirmed, holding that plaintiff had injected the otherwise restricted issue into the case and opened the matter to cross-examination.[316]

D. Statutory Considerations

In considering whether a jurisdiction should permit inquiry into a juror's political affiliation, it is relevant to consider whether the state allows public access to voter registration information. Some states may regard this data as confidential. For example, the California Secretary of State says registration information is available for only select purposes:

> The Elections Code allows voter information to be released to any candidate for federal, state, or local office, to any committee for or against any initiative or referendum measure for which legal publication is made, and to any person for election, scholarly, journalistic, or political purpose, or for governmental purposes, as determined by the Secretary of State's Office.[317]

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[313] *Id.* at 900.

[314] *Id.*

[315] *Id.*

[316] *Id.* at 900–01. Plaintiffs' counsel also expressly waived his objection to this line of cross-examination. The appellate court used that concession as an alternate ground for its holding. *Id.*

[317] California Secretary of State Homepage, Elections Division, Frequently Asked Questions, *at* http://www.ss.ca.gov/elections_faq.htm (last visited Feb. 5, 2004). The Secretary of State may take an unduly restrictive view. CAL. ELEC. CODE § 2194(a) (West 2003) says: "The voter registration card information identified in subdivision (a) of Section 6254.4 of the Government Code: (1) shall be confidential." But CAL. GOV'T CODE § 6254.4 (West 2003) covers only "[t]he home address, telephone number, e-mail address, precinct number, or other number specified by the Secretary of State for voter registration purposes, and prior registration information shown on the voter registration card." *Id.*

Other jurisdictions, however, make voter registration rolls public.[318] Certain statutes, in fact, require the disclosure of the list of prospective jurors in advance of the trial.[319] In a jurisdiction in which voter registration is public information, it seems inconsistent to treat those data as confidential on voir dire. Indeed, most people do not keep their politics secret, but readily discuss such things with friends and acquaintances.[320] It would seem that only a relative minority would believe, like Brandborg, that revealing his political registration would be an invasion of privacy.

Many jurisdictions have laws protecting the privacy of one's vote. Thus, there seems to be no reported case in which counsel was permitted to ask for whom a juror voted. Were this question to arise in a given jurisdiction, counsel should research whether a statute or rule of court bears on the matter.[321]

E. Summary of Observations

It is very unlikely that a juror's party registration, per se, will give rise to a challenge for cause. Nevertheless, counsel often seek to use that bit of

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The registration card contains more information than that, including party affiliation. *See* CAL. ELEC. CODE § 2150 (West 2003).

It is unclear whether prosecutors in criminal prosecutions where the state is a party would have access to voter registration rolls as a "government purpose." According to representatives at the California Secretary of State's office, such a request has not been made within recent memory. Telephone interviews with Andrew Hinkel, Assoc. Program Analyst, California Secretary of State (June 11, 1999) and Linda Cabatic, Senior Staff Counsel, California Secretary of State (Mar. 2, 2004).

[318] *See, e.g.*, GA. CODE ANN. § 21-2-236 (West 2003); IND. CODE ANN. § 3-7-27-6 (2003); 17 VT. STAT. ANN. tit. 17, § 2150 (2003); VA. CODE ANN. § 24.2-442 (Michie 2003) (all providing for some type of general public access to voter registration rolls); United States v. Chapin, 515 F.2d 1274, 1290 (D.C. Cir. 1975) (stating that the District of Columbia Board of Elections makes such information available); Brandborg v. Lucas, 891 F. Supp. 352, 356 (E.D. Tex. 1995) (stating that political affiliation is discernible from public records).

[319] 18 U.S.C. § 3432 (2003). A defendant charged with "treason or other capital offense" must be given a list of the veniremen "at least three entire days before commencement of trial." 28 U.S.C. § 1863 (2003). Each district court must have a written plan for random selection of grand and petit jurors. *Id.* § 1863. Each plan must "fix the time when the names drawn from the qualified jury wheel shall be disclosed to parties and to the public." *Id.* § 1863(b)(7).

[320] In California, where voting lists are not available, party affiliation lists are posted at polling places during primary elections. Your neighbor's political preference is no secret.

[321] *See supra* notes 194, 200.

information in determining whether to exercise a peremptory challenge.[322] Since the relevance of party registration seems limited, there does not appear to be a strong case to be made for asking jurors. In jurisdictions in which political registration is a matter of public record, however, there does not seem to be as strong a privacy consideration either, and there seems less reason to deny counsel the information, even if only marginally relevant or useful.

In nonpolitical cases, courts have split on whether to permit parties to ask a prospective juror's political affiliation. A review of reported materials suggests courts are more comfortable permitting this to be asked in a questionnaire rather than in live voir dire, although even that is not universally true. If one wished to be a bit more guarded, the question could be made optional. Given the discretion afforded trial courts, it seems unlikely one would be reversed for either permitting or refusing permission to inquire about a juror's political affiliation.[323]

In cases involving "political corruption," the need for information about the juror's political involvement is increased. Courts generally permit interrogation relevant to the case, although they are reluctant to permit a question about party registration because there is a new competing consideration: the concern that jurors will conclude that party registration matters or that a party (not an individual) is on trial. Thus, courts tend to permit questions about political activity ("did you vote in the last election?" "did you participate in a political campaign?") but not direct questions of political affiliation ("of which political party are you a member?").

Courts also permit more generic questions, such as "would the fact that you are a member of the Democratic, Republican, or some other party, if you are, affect your ability to reach a verdict fairly, based on the evidence you hear, and the law as I give it to you?"[324] These are clearly important in political corruption cases. Indeed, if the court has given the prospective jurors a sufficient statement of the case at the beginning of voir dire, this kind of question may be more effective than in other contexts, and the

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[322] There appears to be no constitutional basis for eliciting this information, except perhaps in the rare case in which it is necessary to insure a fair trial. Thus, a federal court would be very unlikely to reverse a state court decision denying counsel the right to inquire. In federal court, this becomes a matter of the appellate court's "supervisory" role.

[323] This may be less true in a jurisdiction in which the legislature has made political registration confidential, *see* Connors v. State, 158 U.S. 408, 412 (1895), although there seems to be no reported case in which a trial judge was reversed for permitting such inquiry.

[324] *See supra* notes 198–04 and accompanying text.

jurors will be more likely to understand why (and accept that) it is being asked.

Cases arising in turbulent political times are the most difficult. It is not that the legal principles change but that judges too can be affected by the turbulence. There are, unfortunately, cases in which judges have veered from a neutral path. Indeed there is danger on both sides of the straight and narrow. On the one hand, judges must be alert to prevent questioning intended by counsel to influence the jury under the guise of eliciting information on which to base a challenge. Questions should be reviewed carefully to be sure the information-eliciting purpose at least predominates over "preconditioning the jury" purpose. Cases such as *Warr*, *Fitzgerald*, and *Buyle* are not the law's finest.[325]

On the other hand, the parties need to be sure those impaneled are not inflamed by the political heat of the moment. The parties should be granted sufficient voir dire to make a careful evaluation the impact of the times on those called for jury service. If courts are to remain a refuge of reason in difficult political times, careful voir dire is necessary to insure that mission.

IV. RACE, ETHNICITY, NATIONAL ORIGIN, AND GENDER[326]

Fifty years ago, it was widely believed that gender, ethnicity, and race were, each by themselves, important factors in jury selection.[327] More

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[325] *See supra* notes 217–34 and accompanying text.

[326] The categories of "race" and "ethnicity" are not always neatly defined. Indeed, they are sometimes blurred with religious beliefs. *See, e.g.*, United States v. Salameh, 152 F.3d 88 (2d Cir. 1998) (regarding possible prejudice against "Arabs," "Islamic Fundamentalists," and "Muslims"). *But see* Commonwealth v. Pina, 713 N.E.2d 944 (Mass. 1999) (discussing difference between "ethnicity" and "race"). This article does not seek to differentiate such categories for separate analysis. It is concerned with the limits on the right to discover prejudice on account of any such characteristic. Commonwealth v. De La Cruz, 540 N.E.2d 168 (Mass. 1989) (definition of "race").

[327] *See* BUSCH, *supra* note 35. "Some will contend that women make better jurors than men because in the matter of judging they are more careful and serious than men; others will hold to the tradition voiced by Tennyson that 'woman is the lesser man.'" *Id.* § 143, at 210.

> [M]any experienced advocates attach an importance to the national ancestry of a venireman. These usually consider that in criminal cases the Irishman and Jew, because of their national background and natural temperament, will put a greater burden on the prosecution and prove more sympathetic and lenient to a defendant than an Englishman or a Scandinavian, whose passions for the enforcement of law and order are stronger.

recent writings by jury consultants show that these factors are still often considered part of the "demographic" mix, or the "profile" that should be considered in jury selection.[328] Jury consultants often urge that questions about such immutable characteristics be included in supplemental jury questionnaires.

So, for example, the questionnaire used in the O.J. Simpson trial began by asking

2. Are you male ___ or female ___?
3. What is your race? (please circle)
   a) White/caucasian
   b) Black/African American
   c) Hispanic/Latino
   d) Asian/Pacific Islander
   e) Other (please state) ___[329]

But courts are not always so willing to permit such questions. In *United States v. Serafini*, the court used a questionnaire that asked for gender, but struck the proposed question about race and ethnic background.[330] In *United*

Id. § 146, at 210.

[328] *See, e.g.*, GINGER, *supra* note 4, § 19.55, at 1101; HARVEY LEVINE, JURY SELECTION 4–17 (1994) NAT'L JURY PROJECT, *supra* note 34, at 3–38. Some modern authors defend the limited utility of "stereotyping" and report their view of some stereotypes. STARR & MCCORMICK, *supra* note 207, at 305–15. *See* LISA BLUE & JANE NADIA SAGINAW, JURY SELECTION: STRATEGY & SCIENCE §§ 7:01, 7:19 (1st ed. 1986) *supra* note 34, §§ 7:01, 7:19 ("Stereotypically, people from Mediterranean populations are considered desirable as jurors for the plaintiff. . . . Persons of German, Scandinavian, Swedish, Finnish, Dutch, Nordic, Scottish, Asiatic, and Russian heritage tend to be stereotypically better for the criminal prosecution."); WAGNER, *supra* note 35, § 1.04[8]; Robert K. Bothwell, *The Ethnic Factor in Voir Dire*, *in* A HANDBOOK OF JURY RESEARCH (Walter F. Abbott & John Batt eds., 1999). *But see* WERCHICK, *supra* note 4, § 8.8 (arguing that race, ethnic background, and religion stereotypes that are used in juror profiles derived from misperceptions); BENNETT ET AL., *supra* note 120, §§ 6.18, 18.19 (arguing that paper profiles are often misleading).

[329] California v. Simpson, Juror Questionnaire, No. BA097211, 1994 WL 564388, at *2 (Cal. App. Dep't Super. Ct. Doc. Oct. 3, 1994). While the questionnaire used in the Oliver North trial did not ask jurors to state their race or gender, the "Juror Summary Form" apparently used by counsel did contain spaces for counsel or a jury consultant to fill in those bits of information. FREDERICK, *supra* note 43, at 145.

[330] United States v. Serafini, 57 F. Supp. 2d 108, 112 (M.D. Pa 1999).

States v. McDade, the court struck even a proposed question about gender.[331]

What law underlies this? Three strands of authority are relevant. One involves the law regarding the composition of juries. A second involves a party's right to ask questions about a juror's race or ethnicity. The third involves questions about a juror's prejudice on account of certain immutable characteristics.

A. The Law Regarding the Composition of Juries

More than one hundred years ago, the Supreme Court ruled that the exclusion of blacks from jury service violated the Fourteenth Amendment. *Strauder v. West Virginia* held unconstitutional a West Virginia statute that permitted only white men to serve on grand and petit juries.[332] Over the years, the Court has consistently upheld that precedent.[333]

In 1975, in *Taylor v. Louisiana*, the Supreme Court determined women must not be excluded from jury service based exclusively on sex.[334] Louisiana's constitution and statutes prohibited the state from selecting a woman for jury service unless she filed a declaration of her desire to serve on a jury.[335] As a result, women comprised less than ten percent of the jury

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[331] United States v. McDade, 929 F. Supp. 815, 816–17 (E.D. Pa. 1996) (noting that since it is unconstitutional to exclude a juror based on gender, it is impermissible to ask, regardless "of whether that information might be gleaned from circumstantial evidence").

[332] Strauder v. West Virginia, 100 U.S. 303, 309 (1879) (expressing concern over the limit to race, not gender).

[333] Peters v. Kiff, 407 U.S. 493, 501 (1972); Smith v. Texas, 311 U.S. 128, 130 (1940); Carter v. Texas, 177 U.S. 442, 447 (1900); Gibson v. Mississippi, 162 U.S. 565, 581 (1896); *Ex Parte* Virginia, 100 U.S. 339, 348–49 (1879); *see* cases cited in Powers v. Ohio, 499 U.S. 400, 418–19 (1991) (Scalia, J., dissenting); Swain v. Alabama, 380 U.S. 202, 204 n.1, 230 (1965) (Goldberg, J., dissenting); Eubanks v. Louisiana, 356 U.S. 584, 585 n.1 (1958); *see also* Carter v. Jury Comm'n, 396 U.S. 320, 329–30 (1970) (recognizing that injunctive relief is available to members of a class unconstitutionally excluded from jury service). The Court has also been alert to prevent the de facto (rather than de jure) exclusion of blacks from state court juries. *See* Norris v. Alabama, 294 U.S. 587 (1935); Neal v. Delaware, 103 U.S. 397 (1880).

[334] Taylor v. Louisiana, 419 U.S. 522, 533 (1975); *see* Barbara Allen Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139 (1993) (arguing that women are unequally prevented from serving on a jury through the use of peremptory challenges).

[335] *See Taylor*, 419 U.S. at 523.

pool, although they constituted fifty-three percent of the population.[336] The Court found this practice unconstitutional, holding "the fair cross section requirement as fundamental to the jury trial guaranteed by the Sixth and Fourteenth Amendments."[337] It held that the Constitution demands the "presence of a fair cross section of the community on venires, panels, or lists from which petit juries are drawn."[338]

Four years later, in *Duren v. Missouri*, the Supreme Court held that a prima facie violation of the Sixth Amendment's fair cross-section requirement is demonstrated by proving (1) the allegedly excluded group is "distinctive" in the community; (2) venire representation of this group "is not fair and reasonable in relation to the number of such persons in the community"; and (3) such "underrepresentation is due to the systematic exclusion of the group in the jury-selection process."[339] The Court invalidated a Missouri statute automatically exempting all women from jury service who asked to be excluded.[340] It found that "systematic exclusion" denied defendant his right "to a petit jury selected from a fair cross section of the community."[341]

Strauder, *Taylor*, and *Duren* involved Supreme Court review of *state* statutes. Congress addressed this issue, with respect to *federal* courts in the Jury Selection and Service Act of 1968.[342] The Act states that all federal

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[336] *See id.* at 524.

[337] *Id.* at 530. In a previous case, *Duncan v. Louisiana*, 391 U.S. 145 (1968), the Court held that the Fourteenth Amendment extends the Sixth Amendment's provision of an impartial jury to the states. *Id.* at 149–50.

[338] *Taylor*, 419 U.S. at 526.

[339] Duren v. Missouri, 439 U.S. 357, 364 (1979). The State may rebut this proof by showing that the challenged venire selection process "manifestly and primarily" advances a "significant state interest." *Id.* at 368.

[340] *Id.* at 359. The result of this statutory scheme was that, on average, women composed less than fifteen percent of the jury venire. *Id.*

[341] *Id.*

[342] Jury Selection and Service Act of 1968, Pub. L. No. 90–274, § 101, 82 Stat. 53 (codified as amended at 28 U.S.C. §§ 1861–1878 (1994)). The Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 638 (codified as amended at 28 U.S.C. § 1861 (2003)) had made a step in this direction. Until then, federal law stated that those who were incompetent to serve "by the law of the State in which the district court is held could not serve on a jury in federal court." Act of June 25, 1948, ch. 646 Pub. L. No. 80-773, 62 Stat. 951 (current version at 28 U.S.C. § 1861 (2003)). This meant "federal courts were required by statute to exclude women from jury duty in those States in which women were disqualified." *Taylor*, 419 U.S. at 536. As of 1946, women were still excluded from jury service in about forty percent of the states. *See* Ballard v. United States, 329 U.S.187, 206 (1946).

litigants "have the right to grand and petit juries selected at random from a fair cross section of the community in the district . . . where the [federal] court convenes."[343] The Act generally standardizes federal venire selection and prohibits exclusion from petit juries based on "race, color, religion, sex, national origin, or economic status."[344]

Fundamentally, then, the background to this subject is a clear commitment to full participation in federal and state jury service by all citizens, regardless of their membership in some "distinctive group."

B. The Exercise of Peremptory Challenges

Nonetheless, for most of our history, the commitment to full participation did not affect the exercise of peremptory challenges. As late as 1965, Justice White wrote: "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control."[345] Indeed, the Supreme Court approved the use of peremptories "on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty."[346] That is no longer the law.

In 1986, *Batson v. Kentucky* held that state prosecutors violate the Fourteenth Amendment when they base their peremptory challenges on race.[347] The decision arose after a criminal defendant moved to discharge an all-white jury because the prosecutor had used his peremptory challenges to strike all four African-Americans on the venire.[348] The trial court denied the motion and the Kentucky Supreme Court affirmed.[349]

Both courts rested their decisions on *Swain v. Alabama*,[350] the first Supreme Court case to decide an equal protection question involving the use of peremptory challenges.[351] In *Swain*, the Court held that "a State's purposeful or deliberate denial to Negroes on account of race of participation . . . violates the Equal Protection Clause."[352] *Swain*, however, also held

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[343] 28 U.S.C. § 1861.
[344] *Id.* § 1862.
[345] Swain v. Alabama, 380 U.S. 202, 220 (1965).
[346] *Id.* at 220.
[347] Batson v. Kentucky, 476 U.S. 79, 89 (1986).
[348] *Id.* at 83.
[349] *Id.* at 84.
[350] *Swain*, 380 U.S. at 202.
[351] *See* Powers v. Ohio, 499 U.S. 400, 404 (1991).
[352] *Swain*, 380 U.S. at 203–04.

that the petitioner must "show the prosecutor's systematic use of peremptory challenges [based on race] over a period of time."[353] Such systematic use was very difficult to prove.[354]

Batson overruled *Swain*, holding that a defendant establishes a prima facie violation if the facts and circumstances "raise an inference that the prosecutor used [the peremptory challenges] to exclude the veniremen from the petit jury on account of their race."[355] Upon such a showing, the burden shifts to the prosecutor to provide a race-neutral explanation.[356] Then, the court decides whether the defendant established purposeful discrimination.[357]

Batson held that a prosecutor who bases his peremptory challenges on race violates the equal protection rights of both the defendant and the jurors.[358] Subsequent cases have expanded *Batson* by focusing on the equal protection rights of potential jurors. *Powers v. Ohio* held that a white criminal defendant may object to the prosecutor's discriminatory peremptory challenge of black veniremen, because a defendant has third-party standing to assert the equal protection rights of the challenged jurors.[359]

In *Edmonson v. Leesville Concrete Co.*, the Court extended *Batson* to civil litigants by holding that discriminatory conduct by civil parties qualifies as state action.[360] In *Georgia v. McCollum*, the Court held that criminal defendants function as state actors, so the Constitution subjects them to the same limits on their use of peremptory challenges.[361] In *Hernandez v. New York*, the Court stated that a prosecutor may not use his

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[353] *Id.* at 227.

[354] In the thirty years after *Swain*, only two litigants fulfilled this burden of proof. *See* McCray v. Abrams, 750 F.2d 1113, 1120 (2d Cir. 1984) (citing State v. Brown, 371 So. 2d 751 (La. 1979); State v. Washington, 375 So. 2d 1162 (La. 1979)).

[355] Batson v. Kentucky, 476 U.S. 79, 96 (1986).

[356] *See id.* at 97–98.

[357] *See id.* The Supreme Court later clarified this three-step process in *Purkett v. Elem*, 514 U.S. 765, 768 (1995). In *Purkett*, the Court held the race-neutral explanation by the party exercising the peremptory need not be "persuasive or even plausible" and that "[t]he persuasiveness of the justification" is determined in the third step of the *Batson* process. *Id.*

[358] *Batson*, 476 U.S. at 87. *Batson* stated that "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Id.* The Court stated this again in *Powers v. Ohio*, 499 U.S. 400, 406 (1991).

[359] *Powers*, 499 U.S. at 406.

[360] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 622 (1991).

[361] Georgia v. McCollum, 505 U.S. 42, 59 (1992).

peremptory challenges to strike Hispanics from a venire by reason of their ethnicity.[362] Other cases have held or assumed that American Indians,[363] Mexican-Americans,[364] Asian-Americans,[365] whites,[366] and Italian-Americans,[367] are "cognizable racial groups."[368]

More recently, in *J.E.B. v. Alabama ex rel. T.B.*, the Court extended *Batson*'s protection to gender-motivated peremptory challenges.[369] It held that a litigant is in violation of the Equal Protection Clause when he exercises peremptory challenges on the basis of gender. As the Court stated, "whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice."[370]

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[362] Hernandez v. New York, 500 U.S. 352, 355 (1991) (holding that the prosecutor had articulated a plausible, race-neutral explanation for striking Hispanic jurors); *accord* Castaneda v. Partida, 430 U.S. 482, 495 (1977) ("[I]t is no longer open to dispute that Mexican-Americans are a clearly identifiable class"); Hernandez v. Texas, 347 U.S. 475 (1954); People v. Trevino, 704 P.2d 719 (Cal. 1985) (holding that the term "Spanish-surnamed" is sufficiently descriptive of Hispanics, a cognizable class within the community); Benavides v. Am. Chrome & Chems., Inc., 893 S.W.2d 624 (Tex. App. 1994).

[363] *See, e.g.*, United States v. Iron Moccasin, 878 F.2d 226, 229 (8th Cir. 1989); United States v. Chalan, 812 F.2d 1302, 1314 (10th Cir. 1987).

[364] *See Castaneda*, 430 U.S. at 495.

[365] United States v. Sneed, 34 F.3d 1570, 1578–79 (10th Cir. 1994).

[366] Virgin Islands v. Forte, 865 F.2d 59, 64 (3d Cir. 1989); Roman v. Abrams, 822 F.2d 214, 227–28 (2d Cir. 1987).

[367] United States v. Biaggi, 853 F.2d 89, 96 (1988); *cf.* United States v. Bucci, 839 F.2d 825, 833 (1st Cir. 1988) (involving a defendant that did not show that Italian-Americans have been subjected to discriminatory treatment); United States v. Di Pasquale, 864 F.2d 271 (3d Cir. 1988) (involving a defendant that failed to offer proof as to the presence of a cognizable group); United States v. Sgro, 816 F.2d 30, 33 (1st Cir. 1987) (involving a defendant that failed to offer proof as to the presence of a cognizable group).

[368] For useful discussions of what constitutes a "cognizable racial group," see *Bucci*, 839 F.2d at 833; United States v. Di Pasquale, 864 F.2d 271, 276–77 (3d Cir. 1988); *Roman*, 822 F.2d at 227–28; United States v. Marcano, 508 F. Supp. 462, 469–70 (D.P.R. 1980); Rubio v. Superior Court, 593 P.2d 595, 598 (Cal. 1979); Adams v. Superior Court, 524 P.2d 375, 378 (Cal. 1974) (discussing "cognizable group").

[369] J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 146 (1994).

[370] *Id.* at 128. Recently, a California court extended *People v. Wheeler*, 583 P.2d 748, 757 (Cal. 1978), the California equivalent of *Batson*, to sexual orientation. *See* People v. Garcia, 92 Cal. Rptr. 2d 339, 347–48 (2000). Soon after

The net result of *Batson*, *Powers*, *Edmonson*, *McCollum*, *Hernandez*, and *J.E.B.* is that neither side in a criminal or civil trial may base a peremptory challenge on race, ethnicity, or gender. With that as background, it is possible to examine the law relating to voir dire and immutable characteristics of venirepeople.

C. *Direct Questions About Immutable Characteristics*

One should first distinguish two types of questions: (1) those that ask a prospective juror about his or her own race, ethnic origin, or gender; and (2) those that seek to understand whether the juror has any biases based on the immutable characteristics of the parties or witnesses. Most reported cases focus on the latter. But there are times when jurors are asked the former.

As one California judge recently wrote:

> Race and ethnicity are not necessarily patent.... While gross estimations of race can be made on the basis of physical appearances, such judgments are entirely subjective and often erroneous. And ethnicity has become virtually impossible to judge without inquiry. Our jury venires daily include Cubans named O'Rourke, Indonesians named Opdyke, and Anglos named Gomes. Every trial judge has encountered red-haired, freckle-faced Cardenases and Hispanic-looking Maguires. The country is a melting pot—and proud of it—and a large part of the great folly of stereotyping is that nowhere on earth have race and ethnicity become harder to determine than they are here.[371]

Garcia, the California Legislature codified the rule in CAL. CIV. PROC. CODE § 231.5 (West 2003) ("A party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation or similar grounds."); *accord* Johnson v. Campbell, 92 F.3d 951, 953 (9th Cir. 1996) (assuming, without deciding, that sexual orientation qualifies as a *Batson* classification); Commonwealth v. Jones, 570 A.2d 1338, 1347 (Pa. Super. 1990) (questioning jurors about issues of bias regarding sexual preference). For an example of a recommendation that trial counsel use sexual orientation as part of a juror profile, see WAGNER, *supra* note 35, § 1.04[12]. At least one author argues that a potential juror should be questioned individually regarding his or her sexual orientation. *See* Eisemann, *supra* note 10, at 26–27. Another author, however, argued that such questioning should not be allowed in most cases. *See* Lynd, *supra* note 10, at 288.

[371] *Garcia*, 92 Cal. Rptr. 2d at 346; *see also Wheeler*, 583 P.2d at 752 ("[V]eniremen are not required to announce their race, religion or ethnic origin when they enter the box, and these matters are not ordinarily explored on voir dire.

Nonetheless, federal jurors are required to state their ethnicity in a juror qualification questionnaire of the federal court administrator.[372] The form used by many federal district courts asks the respondent to check either "Mr.," "Mrs.," or "Miss." It then says:

> Please indicate your race on the list below
> ___ Indian (American)
> ___ Oriental
> ___ Black (or Negro)
> ___ White
> ___ Other (Specify)[373]

It is not clear whether counsel has access to the information on these forms during jury selection.

There are also many examples of supplemental jury questionnaires in which counsel have been permitted to ask jurors, in a given case, to state their race, gender, or ethnic background.[374] Indeed, the American Bar Association's Committee on Jury Standards recommend some such information be made available to attorneys at the beginning of voir dire.[375]

The reason, of course, is that the courts of California are—or should be—color blind to all such distinctions among our citizens.").

[372] *See* 28 U.S.C. § 1869(h) (2003) (requiring potential jurors to list their race, as well as other personal information such as name, address, age, race, occupation, education and length of residence within the judicial district. Prior to 1972, venire members could decline to provide race information if they found it objectionable to do so, but the statute was amended to require venire members to list their races. Act of Sept. 29, 1972, Pub. L. No. 92–437, 86 Stat. 740 (codified as amended at 28 U.S.C. § 1869(h)).

[373] Administrative Office of the United States Courts, Form No. AO-178, *reprinted in Marcano*, 508 F. Supp. at 472, *and in* STARR & MCCORMICK *supra* note 207, at 746. The text next to the question on the federal form advises the prospective juror: "this answer is required solely to avoid discrimination in juror selection and has absolutely no bearing on qualifications for jury service." Another version of this form lists the choices as "Black, Asian, Native American—Indian, White, Other (Specify)." Administrative Office of the United States Courts, Form No. F-11987.

[374] BENNETT ET AL., *supra* note 120, at Form 8.28 (discussing the Rodney King beating trial, in which lawyers asked about the "sex" and "race or ethnic background" of the veniremen); FREDERICK, *supra* note 43, App. III, at 224 (indicating that jurors were asked their gender in the Exxon Valdez case).

[375] COMMITTEE ON JURY STANDARDS, AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO JUROR USE AND MANAGEMENT 107 (1993) ("For voir dire purposes, only the basic background information requested in nearly every

There are very few reported cases in which courts have considered whether counsel could ask jurors to reveal their own race or ethnicity during oral voir dire. One such case was *United States v. Barnes*, a high-profile prosecution of fifteen people charged with conspiracy to distribute narcotics in Harlem and the South Bronx.[376] All but one of the fifteen defendants were black.[377] The trial judge was concerned with the juror's safety because of the notoriety of the case, so he withheld the names and addresses of potential jurors.[378] Defense counsel submitted several voir dire questions dealing with potential jurors' religion and ethnicity, as well as their attitudes toward black people. The Second Circuit held that the trial court did not abuse its discretion in refusing to inquire into the ethnic backgrounds of the potential jurors.[379] It said that trial courts may limit questioning about matters that are "too remote from the issues in the case to warrant the intrusion into the potential jurors' private thoughts."[380] Because the criminal charges did not deal with any overt racial issues, ascertaining potential jurors' ethnic backgrounds was not necessary. "There is nothing to indicate that persons of one ethnic type or another are more favorably disposed toward narcotic trafficking or to using firearms."[381]

The appellate court's ruling was bolstered by its belief that the trial judge asked enough questions to discover racial prejudice in the venire.[382] The trial court asked jurors about their general attitude toward black people, whether any of them had moved to a different neighborhood out of concern about "changing conditions," and whether they had any experience with persons of different races that would make them unable to judge people of that race fairly.[383] Several jurors were excused after admitting

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case should be sought. This includes the age [and] gender . . . .").

[376] United States v. Barnes, 604 F.2d 121, 134 (2d Cir. 1979). For an excellent discussion of *Barnes*, see Case Comment, *supra* note 9.

[377] *Barnes*, 604 F.2d at 134.

[378] *Id.* at 134–35. This is not the only case in which an anonymous jury was empanelled. *See* United States v. Scarfo, 850 F.2d 1015, 1022 (3d Cir. 1988) (collecting cases).

[379] *Barnes*, 604 F.2d at 140. The appellate record disclosed some, but not all, information about the ethnic makeup of the jury that was empanelled. *Id.* at 136 n.5.

[380] *Id.* at 140 (citing several cases upholding trial courts' limitation of questioning into matters such as jurors' educational backgrounds and attitudes about sex, drug use, political activists, antiwar demonstrators, and homosexuality).

[381] *Id.*

[382] *Id.* at 136.

[383] *Id.*

they had moved neighborhoods to avoid the increasing drug trafficking in the area or that they were prejudiced against blacks.[384]

The other reported case in which a court was asked to inquire directly about the jurors' national origin was *Virgin Islands v. Felix*.[385] The defendant was a native of St. Thomas, one of the American Virgin Islands. He was prosecuted for the murder of a man from Tortola, one of the British Virgin Islands. At trial, the defense counsel sought to learn if any of the venire was from Tortola. He claimed that Tortolans, who were naturalized American citizens, could be prejudiced toward people from St. Thomas.[386]

The trial judge refused to make that inquiry, instead asking whether the fact that defendant was a native of St. Thomas would affect the jurors' judgment.[387] The Third Circuit held the inquiry to be sufficient because the nature of the prejudice that the defendant alleged was "unfocused" and "diffuse."[388] The circuit court added that public policy supported the trial judge's decision, stating:

> Such an investigation, carried out in a highly visible criminal trial on the island of St. Thomas, could reasonably be expected to foster polarization in the community. In effect, it could be perceived as representing an official endorsement of the notion that there is deep prejudice between those who are nativeborn citizens and those who are not.[389]

These cases are similar to many discussed above. The courts refused to focus on a juror's characteristics, and inquired instead about his or her opinions, prejudices, and beliefs. The focus was not on the juror's skin (or birth certificate), but rather on his or her state of mind.

Inquiry into the juror's state of mind is at issue in the more usual case. How far, then, may a court go in probing that? The next section explores this issue in the context of racial and ethnic prejudice.

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[384] *Id.*

[385] Virgin Islands v. Felix, 569 F.2d 1274, 1276 (3d Cir. 1978).

[386] *Id.*

[387] *Id.* The judge said,

> If then, either because you are a U.S. citizen or because you are a U.S. citizen by naturalization or you lived in any of these neighboring islands, you think that the difference in the status between the deceased, a Tortolian, if that's what it turns out to be, and the defendant, a St. Thomian, if this in any way will affect your judgment in the slightest degree, please raise your card.

Id.

[388] *Id.* at 1277.

[389] *Id.* at 1278.

D. *Questions About Prejudices That May Be Harbored By Prospective Jurors*

Generally, the Supreme Court has afforded trial courts a great deal of discretion in conducting voir dire. The Court has never held that trial judges must ask specific questions or a certain number of questions. The Court, however, has placed some limits on a trial court's discretion in cases involving race. The Court has conducted two separate inquiries: (1) what does the Constitution require and (2) what is the non-constitutional rule applicable to federal court cases?

The development of the modern federal law began in 1931. In *Aldridge v. United States*, the government charged Alfred Aldridge, a black man, with killing a white police officer.[390] At the first trial, a juror stated that the fact that defendant was black and the victim white, had perhaps unduly influenced her. Consequently, at the second trial, the defendant's counsel sought to ask the jurors about racial prejudice they might harbor.[391] The trial court denied the request.[392]

The Supreme Court reversed, holding that the trial court's broad discretion was "subject to the essential demands of fairness."[393] The defense counsel's request did not focus on "immaterial matters" but rather on prejudice that "would disqualify a juror."[394] The trial court erred in failing "to ask any question which could be deemed to cover the subject" of racial prejudice.[395] The fact that the defendant was black and the victim white seemed to require the trial court to "cover the subject" of racial prejudice during voir dire.[396]

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[390] Aldridge v. United States, 283 U.S. 308, 309 (1931).

[391] *Id.* at 309–10.

[392] *Id.* at 310. The Court refused to let the attorney ask potential jurors if they would be influenced by the fact that the "defendant was a negro and the deceased a white man." *Id.*

[393] *Id.*

[394] *Id.* at 311.

[395] *Id.*

[396] Courts after *Aldridge* interpreted the decision this way (that is, if the victim and accused are of different races, the court must inquire into racial prejudice). *Aldridge*, however, does not clearly require this, stating, "If the defendant was entitled to have the jurors asked whether they had any racial prejudice, by reason of the fact that the defendant was a negro and the deceased a white man, which would prevent their giving a fair and impartial verdict, we cannot disregard the court's refusal . . . . " *Id.*

Significantly, *Aldridge* did not state clearly the source of its holding. It used the word "impartial," suggesting a Sixth Amendment foundation,[397] but the Supreme Court later said that *Aldridge* was based on the Court's supervisory powers over the federal courts.[398]

Four decades after *Aldridge*, the Supreme Court decided *Ham v. South Carolina*[399] and *Ristaino v. Ross*,[400] the two cases that help define the constitutional standard for inquiry into racial prejudice. In the first, the state indicted Gene Ham, an African-American, for drug possession.[401] In his defense, Ham argued that because of his race and civil rights activities, the police were "out to get him," and that he was "framed."[402] Ham proposed that the trial judge ask four questions of the venire. Two focused on possible racial prejudice, one involved the fact that the defendant had a beard, and one involved pretrial publicity.[403] The trial court rejected the four inquiries, although it did ask three general questions about bias, prejudice, and partiality required by South Carolina law.[404]

The Supreme Court reversed and held that under the facts of the case[405] the Fourteenth Amendment required questioning the jurors about racial prejudice for two reasons. First, "one of the purposes of the Due Process Clause of the Fourteenth Amendment is to insure these 'essential demands

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[397] *Id.* Criminal defendants have a right to trial by an "impartial jury." U.S. CONST. amend. VI.

[398] Ristaino v. Ross, 424 U.S. 589, 598 n.10 (1976).

[399] *See* Ham v. South Carolina, 409 U.S. 524 (1973).

[400] *See Ristaino*, 424 U.S. at 589.

[401] *Ham*, 409 U.S. at 524–25.

[402] *Id.* at 525.

[403] *Id.* at 525–26. At the time of Ham's trial, "rebellious youth" and "hippies" often wore beards, while most adults did not. Beards were a symbol of the cultural divide of the time. That probably motivated Ham to raise the issue on voir dire.

[404] *Id.* at 526 n.3 (quoting S.C. CODE § 38–202).

[405] *Ristaino*, 424 U.S. at 596–97 (1976), the Court isolated the facts that caused *Ham* to require inquiry. It said,

> Ham's defense was that he had been framed because of his civil rights activities. His prominence in the community as a civil rights activist, if not already known to veniremen, inevitably would have been revealed to the members of the jury in the course of the presentation of that defense. Racial issues therefore were inextricably bound up with the conduct of the trial. Further, Ham's reputation as a civil rights activist and the defense he interposed were likely to intensify any prejudice that individual members of the jury might harbor.

Id.

of fairness,'" which limited the trial court's discretion in *Aldridge*.[406] Second, "a principal purpose of the adoption of the Fourteenth Amendment was to prohibit the States from invidiously discriminating on the basis of race."[407] For these reasons, the Court found the Fourteenth Amendment's Due Process Clause required the trial court to ask about racial bias.[408]

The Court, however, found that the trial court did not violate Ham's constitutional rights by refusing to examine jurors about possible prejudice against Ham because he wore a beard.[409] The Court based its holding on "the traditionally broad discretion accorded to the trial judge in conducting voir dire and [its] inability to constitutionally distinguish possible prejudice against beards from a host of other possible similar prejudices."[410]

Three years later, the Supreme Court limited *Ham* in *Ristaino v. Ross*.[411] A Massachusetts court convicted James Ross, a black man, of several violent crimes against a white security guard.[412] Prior to voir dire, Ross asked the trial court to question prospective jurors about racial prejudice.[413]

The *Ristaino* Court rejected the contention that, under *Ham*, a trial court must probe into racial prejudice every time the race of the victim and a criminal defendant are different. Rather, the *Ham* opinion "reflected an assessment of whether under all of the circumstances presented there was a constitutionally significant likelihood that, absent question about racial prejudice, the jurors would not be as 'indifferent as (they stand) unsworne.'"[414] Although the case involved an interracial crime, racial issues were not "inextricably bound up with the conduct of the trial," and an inquiry was therefore not constitutionally required.[415]

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[406] *Ham*, 409 U.S. at 526 (quoting Aldridge v. United States, 283 U.S. 308, 310 (1931)).

[407] *Id.* at 526–27 (citing The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873)).

[408] The Court explained that inquiry into racial prejudice "derives its constitutional stature from the firmly established precedent of *Aldridge* and the numerous state cases upon which it relied, and from a principal purpose as well as from the language of those who adopted the Fourteenth Amendment." *See id.* at 528.

[409] *Id.*

[410] *Id.* (citation omitted).

[411] Ristaino v. Ross, 424 U.S. 589 (1976).

[412] *Id.* at 590.

[413] *Id.* at 590 n.1.

[414] *Id.* at 596 (quoting COKE ON LITTLETON 155b (19th ed. 1832)).

[415] *Id.* at 597.

Ristaino established a "special circumstances" rule: the Constitution only requires a court to allow defendants to ask questions designed to elicit racial prejudice when the special circumstances of a case indicate a significant likelihood of prejudice by the jurors.[416] The *Ristaino* Court, however, did not state expressly what circumstances necessitate inquiry into racial bias.

The Court defined one "special circumstance" in *Turner v. Murray*.[417] *Turner* involved the trial of a black man for the murder of a white jewelry store owner.[418] During voir dire, in Virginia state court, the trial judge refused to ask any of the defendant's proposed questions regarding racial bias.[419] Instead, the judge asked only general impartiality questions.[420] The jury convicted Turner of murder and recommended a death sentence, which was imposed by the trial court.[421]

In response to a petition for habeas corpus, the Supreme Court vacated Turner's death sentence.[422] The Court ruled that the additional fact that the jury convicted Turner of a capital crime distinguished it from *Ristaino*, and presented a "special circumstance," which mandated the requested inquiry.[423] The Court announced a limited per se rule: "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias."[424] However, it noted that the trial court maintains discretion over the form and number of the questions and the decision whether to examine

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[416] *Id.* at 596–97.

[417] Turner v. Murray, 476 U.S. 28 (1986).

[418] *See id.* at 29.

[419] *See id.* at 30–31.

[420] *See id.* at 31. In fact, the judge asked the questions before the jury knew it was an interracial crime. *Id.*

[421] *Id.*

[422] *Id.* at 37. A plurality of the Court based its decision on the special inquiry a jury must make in deciding the penalty, not the guilt, phase of the case. Since a Virginia jury is given "broad discretion" in determining the sentence, "there is a unique opportunity for racial prejudice to operate but remain undetected." *Id.* at 35 (plurality opinion). Thus, the Court vacated the sentence but not the determination of guilt. *Id.* at 37 (plurality opinion). Although this may have been of limited utility to Mr. Turner, as a practical matter it insures that voir dire on racial issues will be permitted at the outset of subsequent inter-racial capital trials in which the same jury hears both the guilt and penalty phases of the case. *See id.* at 45 (Marshall, J., concurring in part and dissenting in part).

[423] *See id.* at 33 (plurality opinion).

[424] *Id.* at 36–37.

jurors collectively or individually.[425] The Court described this rule as "minimally intrusive."[426]

Thus, the Supreme Court has held that the Constitution does not require questioning about racial prejudice absent "special circumstances," but a capital charge is a "special circumstance." In non-capital cases, "the mere fact that [a defendant] is black and his victim white does not constitute a 'special circumstance' of constitutional proportions."[427] The fundamental question is whether "there [is] a constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be as 'indifferent as (they stand) unsworne.' "[428] Where racial issues are "inextricably bound up with the conduct of the trial," racial questioning should be permitted.[429]

Of course these constitutional requirements are applicable in federal as well as state courts, but in federal courts, more is required. *Ristaino* illustrates this well. In this case, the Supreme Court found the Massachusetts courts did not deprive defendant of a constitutional right,[430] but it noted that "the wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant. Under our supervisory power we would have required as much of a federal court faced with the circumstances here."[431]

In *Rosales-Lopez v. United States*, the Supreme Court undertook to determine what rule should apply under that "supervisory power."[432] First, it observed the tension inherent in deciding whether to permit questioning about racial prejudice. On the one hand, it may suggest to the jury that racial prejudice has more sway in federal court than it should. On the other hand, if questioning is not permitted, the defendant may feel he was not afforded a fair trial. The Court stated:

> [I]t is usually best to allow the defendant to resolve this conflict by making the determination of whether or not he would prefer to have the

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[425] *See id.* at 37.

[426] *Id.*

[427] *Id.* at 33.

[428] Ristaino v. Ross, 424 U.S. 589, 596 (1976) (quoting COKE ON LITTLETON, *supra* note 414).

[429] *Id.* at 597. In *Rosales-Lopez v. United States*, 451 U.S. 182 (1981), the Court described this as a "critical factor." *Id.* at 189.

[430] *Ristaino*, 424 U.S. at 597.

[431] *Id.* at 597 n.9.

[432] *Rosales-Lopez*, 451 U.S. at 182.

> inquiry into racial or ethnic prejudice pursued. Failure to honor his request, however, will be reversible error only where the circumstances of the case indicate that there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury.[433]

Then, the plurality stated a two-part test. First, if the case involves a violent crime, and the victim and defendant are of different racial or ethnic origins, "a reasonable possibility" of prejudice exists and federal courts must permit racial inquiry on voir dire if the defendant requests it.[434] Beyond that, if the "total circumstances suggest a reasonable possibility that racial or ethnic prejudice will affect the jury,"[435] the trial court should permit questions about racial prejudice. The trial court will be given deference in appellate review.[436]

Second, if the facts of the case do not give rise to the need for such questions, then "the trial court must determine if the external circumstances of the case indicate a reasonable possibility that racial or ethnic prejudice will influence the jury's evaluation of the evidence."[437] In *Rosales-Lopez*, the defendant was of Mexican descent.[438] He was charged with smuggling illegal aliens across the Mexican-American border and was tried in San Diego, a few miles from Mexico.[439] The trial judge explained the purpose of voir dire was, in part, to be sure to discover "underlying prejudices."[440] He asked jurors their feelings towards "aliens" and the "alien problem" and followed that with a general question about whether there was any reason they could not be fair and impartial.[441] The Supreme Court held that to be sufficient to discern any prejudice.[442] The "external circumstances" were addressed satisfactorily.[443]

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[433] *Id.* at 191.

[434] *Id.* at 192.

[435] *Id.*

[436] *Id.* at 188.

[437] *Id.* at 192–93; *see also* United States v. Cordova, 157 F.3d 587 (8th Cir. 1998) (analyzing the defendant's claim that trial court's inquiry regarding possible prejudice against Hispanics created a "presumption of guilt"). *Id.*

[438] *Rosales-Lopez*, 451 U.S. at 184.

[439] *Id.*

[440] *Id.* at 186.

[441] *Id.*

[442] *Id.* at 185. Therefore, it was unnecessary to ask the question proposed by defendant: "Would you consider the race or Mexican descent of Humberto Rosales-Lopez in your evaluation of this case? How would it affect you?"

[443] *Id.*

It is important to note that the first part of this test did not command a majority of the court. Indeed, Justice Rehnquist and Chief Justice Burger concurred in the result, but refused to endorse a "bright line" test that would require racial questioning whenever there was a violent crime between members of two different racial or ethnic groups.[444] They would continue to commit such matters to the discretion of the trial judge subject to case-by-case review by the appellate courts.[445]

On the other hand, Justices Stevens, Brennan, and Marshall based their dissent on a view that the plurality's rule is too crabbed. They would have permitted racial questioning in a broader range of cases other than those involving violent, interracial crimes.[446] Rather, they would have established a rule "entitling a minority defendant to some inquiry of prospective jurors on voir dire about possible racial or ethnic prejudice unrelated to the specific facts of the case."[447]

That appears to be the current state of federal law, with one caveat: *Mu'Min v. Virginia* was a case in which the Supreme Court considered whether it was necessary to ask about jurors' exposure to pretrial publicity.[448] In dicta, Chief Justice Rehnquist, writing for a majority of the Court, endorsed the plurality position in *Rosales-Lopez* as a matter of constitutional law. He summarized the prior law as follows: "[T]he possibility of racial prejudice against a black defendant charged with a violent crime against a white person is sufficiently real that the Fourteenth Amendment requires that inquiry be made into racial prejudice . . . ."[449] Since *Mu'Min* involved a murder and since this discussion was dicta, one cannot be certain that the Supreme Court intended to expand the constitutional requirements. There have been no further Supreme Court opinions on point, however.

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[444] *Id.* at 194 (Rehnquist, J., concurring in result).

[445] *Id.* at 194–95 (Rehnquist, J., concurring in result).

[446] *Id.* at 202 (Stevens, J., dissenting).

[447] *Id.* at 201 (Stevens, J., dissenting).

[448] Mu'Min v. Virginia, 500 U.S. 415, 417 (1991).

[449] *Id.* at 424. There is one other distinction between Chief Justice Rehnquist's statement in *Mu'Min* and the plurality in *Rosales-Lopez*. The latter would require inquiry into racial prejudice whenever there is a violent crime and the defendant and victim are of different racial or ethnic origins. *Id.* The Chief Justice's dictum in *Mu'Min* refers only to a case in which a black defendant is accused of committing violence against a white victim. *Id.* That is likely a distinction without a difference. *But see infra* note 507 and accompanying text (discussing Massachusetts cases that distinguish between race and ethnicity).

A clear view of the impact of *Ristaino* and *Rosales-Lopez* can be had by examining a set of Fourth Circuit cases. Before *Rosales-Lopez* the Fourth Circuit had held it was reversible error to deny a black defendant the right to ask prospective jurors: "Is there anybody on the jury panel who is a member of the White Citizen's Council, Defenders of State Sovereignty, or any similar organization?"[450] Four years after *Rosales-Lopez*, a case arose in which the trial court had refused to ask essentially the same question.[451] This time the circuit court reached the opposite result and found no abuse of discretion.[452]

By and large, the federal appellate courts have followed the Supreme Court's rulings carefully, albeit with some occasional hints of dissent. An example of a case that hewed the line closely is *United States v. Tipton*.[453] Three black defendants were tried for several murders in connection with the activities of a large drug ring.[454] They asked the district court judge to ask sixty-two questions designed to ferret out racial prejudice.[455] The judge, who conducted individual voir dire in chambers, asked only one such question: "Do you harbor any bias or prejudice, racial or otherwise, that would prevent you from being fair to the defendants in this case?"[456] "The

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[450] Smith v. United States, 262 F.2d 50, 51 (4th Cir. 1958); *see also* United States v. Johnson, 527 F.2d 1104, 1106–07 (4th Cir. 1975) (holding that it was reversible error to refuse to permit black defendant to ask "Do you believe that black men are more prone to commit crimes than white men?"); United States v. Gore, 435 F.2d 1110, 1113 (4th Cir. 1970) (holding that it was reversible error to refuse to ask whether the race of the defendant would prevent any juror from returning a fair and impartial verdict for or against either the accused or the government).

[451] *See* United States v. Brown, 767 F.2d 1078, 1080 n.31 & 32 (4th Cir. 1985).

[452] *See id.* at 1083. At least one Georgia court held (post-*Ristaino* and post-*Rosales-Lopez*) that it is permissible to ask whether a juror is a member of "any club or organizations such as the Southern Knights of the KKK or the Invisible Empire of the KKK." *See* Mize v. State, 378 S.E.2d 392, 393 (Ga. Ct. App. 1989). The opinion was based on GA. CODE ANN. § 15-12-133 (1989) that gives a litigant "an absolute right to examine prospective jurors about . . . religious, social and fraternal connections of the juror." *Mize*, 378 S.E.2d at 393 (citing Cowen v. State, 275 S.E.2d 665 (Ga. Ct. App. 1980)).

[453] United States v. Tipton, 90 F.3d 861 (4th Cir. 1996).

[454] *Id.* at 867.

[455] *Id.* at 877.

[456] *Id.*; *see also* Ham v. South Carolina, 409 U.S. 524, 525 n.2, 527 (1973) (holding that the question "[w]ould you fairly try this case on the basis of the evidence and disregarding the defendant's race?" was "sufficient to focus the

court then permitted limited follow-up inquiry by counsel depending upon responses made to his general question."[457] Noting that race was not "inextricably bound up with the conduct of the trial,"[458] finding no "special circumstances,"[459] and finding the murders were not inter-racial, the Fourth Circuit found voir dire was adequate.[460]

Occasionally, an appellate court chafes. In *Llach v. United States* the defendant was a Colombian-born, naturalized American citizen charged with drug related crimes.[461] Despite his request, the trial judge refused to ask jurors about possible bias against Hispanics. Instead, he simply asked the jurors, "as a group and individually, whether they could serve fairly and impartially."[462] In affirming the lower court, Judge Theodore McMillian noted:

> Although this court is constrained to follow *Rosales-Lopez v. United States*, the author agrees with the dissent in *Rosales-Lopez*, that the majority opinion is based on an overly restrictive interpretation of *Aldridge v. United States*. As the dissent notes, although *Aldridge* involved "special circumstances," i.e. interracial, violent crime, neither the reasoning in the opinion for the Court, nor the reasoning in the state court opinions quoted at length by the Court in *Aldridge* relied on those special circumstances.
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> The purpose of voir dire is to assure that a defendant is tried before an impartial and unbiased panel of jurors. Although certain cases will

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attention of prospective jurors on any racial prejudice they might entertain").

[457] *Tipton*, 90 F.3d at 877.

[458] *Id.* (citing Ristaino v. Ross, 424 U.S. 589, 597 (1976)).

[459] *Id.*; *accord* Turner v. Murray, 476 U.S. 28, 37 (1986); Rosales-Lopez v. United States, 451 U.S. 182, 189 (1981); *Ristaino*, 424 U.S. at 589.

[460] *Tipton*, 90 F.3d at 877–78. *Tipton* raised an additional issue: the district court judge was black. The defendants argued this made "the concealment of racial bias more than ordinarily a risk" and asserted it was an abuse of discretion for the judge to conduct the voir dire by himself. *Id.* at 872. The circuit court rejected that out of hand. *Id.* It responded, "[A]side from the shakiness of the reason advanced by appellants—that the prospective jurors would be significantly more inhibited by questions put by the judge himself than by questions put by others in his immediate presence—the adoption of such a per se rule would be unthinkable as a matter of policy." *Id.* at 878 n.8.

[461] Llach v. United States, 739 F.2d 1322, 1326 (8th Cir. 1984).

[462] *Id.* at 1333. The questions defendant submitted were: "Would the fact that the accused is of Spanish background affect your ability to fairly try this case?" and "Do you feel you can sit as a fair and impartial juror at the trial of a Latin defendant?" *Id.* at 1331 n.5.

> necessarily engender prejudice or bias, thus giving rise to special circumstances, there are jurors who harbor prejudices against all members of a race, religion or ethnic group for reasons totally unrelated to the facts of the case. If a prospective juror is prejudiced against Latins, it is illogical that courts only seek to exclude such a juror when interethnic, violent crime is involved. No biased or prejudiced juror should ever be permitted to sit in judgment of one against whom the juror is biased.[463]

The court concluded that the better practice would have been to honor the defendant's request for more detailed voir dire. Nevertheless, the appellate panel could not find the trial judge abused his discretion by not doing that.[464]

Other circuit courts have expressed the view that the "wiser" or "better practice" is to permit questioning if defendant requests it.[465] That, of

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[463] *Id.* at 1333 n.7 (citations omitted). The other two members of the panel filed a concurring opinion that simply noted their view that the trial court committed no prejudicial error. *Id.* at 1334 (Lay, C.J., concurring) (citing *Rosales-Lopez*, 451 U.S. at 182).

[464] *Id.* at 1333.

[465] *See* United States v. Tocco, 200 F.3d 401, 412–13 (6th Cir. 2000), *cert. denied*, 123 S. Ct. 2513 (2003) ("[W]e still believe the district court would have been well-advised to allow more detailed questioning to reveal an individual prospective juror's prejudice, if any, against Cosa Nostra and the obvious Italian heritage of the defendants and the Sicilian or Italian connection with the Mafia.... [T]he district court's failure to ask more specific questions regarding Mafia or Italian-American prejudice was a mistake, but not an error compelling reversal under the circumstances."); United States v. Kyles, 40 F.3d 519, 525–26 (2d Cir. 1994) ("[W]hile the wiser course would have been for the district judge to ask the prospective jurors about racial bias, as requested we are convinced that his refusal to do so was not reversible error." (citations omitted)); United States v. Brown, 938 F.2d 1482, 1485 (1st Cir. 1991) (holding that "giving the defendant's instruction would have been more prudent," but it was not required); United States v. Groce, 682 F.2d 1359, 1361 (11th Cir. 1982) ("In our judgment, it is usually best to allow the defendant to resolve this conflict by making the determination of whether or not he would prefer to have the inquiry into racial or ethnic prejudice pursued. Failure to honor his request, however, will be reversible error only where the circumstances of the case indicate that there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury." (quoting *Rosales-Lopez*, 451 U.S. at 191)). Prior to *Rosales-Lopez*, the Ninth Circuit held that "[w]hile it would have been the better practice to submit the requested questions, we cannot say that there was an abuse of discretion in failing to do so under the circumstances of this case, particularly in view of the fact that no objection was made to the court's failure to ask the questions." United States v. Walker, 491 F.2d 236, 239 (9th Cir. 1974).

course, follows the Supreme Court's statement in *Rosales-Lopez*.[466]

Few courts have found "special circumstances" requiring reversal of a district court's ruling. One that did, prior to *Ristaino*, was *United States v. Bear Runner*.[467] There, an American Indian was being tried for larceny. In the months prior to trial tension between Native Americans and whites ran high due to a series of well-publicized events in western and central South Dakota, including the occupation of Wounded Knee.[468] Although the case at bar had nothing to do with those events, the appellate court focused on the passions in the community. Since the "overall circumstances and surroundings suggest the possibility of racial bias," it held the trial judge should have conducted a searching inquiry, directed to each potential juror, regarding the possibility of racial prejudice.[469] Similarly, a California court held that when a black defendant claims a white police officer fabricated the claim against him, a "special circumstance" is present that requires racial issues to be probed in voir dire.[470]

Some cases have struggled with the definitional questions. For example, in *United States v. Kyles*, the Second Circuit held that armed bank robbery did not qualify as a violent crime for purposes of *Rosales-Lopez*.[471] Although the defendant was black and the bank tellers were white, the tellers did not suffer any "physical or proprietary" injury.[472] The court found the trial judge did not abuse his discretion by refusing to ask prospective jurors about race bias.[473]

Similarly, courts have been required to assess the likelihood of racial prejudice in the communities in which they sit. For example, a district court judge in Puerto Rico held that a black defendant's allegations that racism existed in Puerto Rico were not special circumstances requiring voir dire into racial bias.[474] Although the case involved drug-related offenses, assault, and causing an intentional killing while engaged in a continuing

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[466] *See supra* notes 432–47 and accompanying text.

[467] United States v. Bear Runner, 502 F.2d 908, 912–13 (8th Cir. 1974).

[468] *Id.* at 909.

[469] *Id.* at 912; *see also* Jordan v. Lippman, 763 F.2d 1265, 1276 n.12 (11th Cir. 1985) (holding that additional voir dire should have been permitted regarding exposure to pretrial publicity in a defendant's trial for participation in interracial prison riot that was conducted after a weekend civil rights march that received widespread notoriety).

[470] *See* People v. Wilborn, 82 Cal. Rptr. 2d 583, 585 (Cal. Ct. App. 1999).

[471] United States v. Kyles, 40 F.3d 519, 525 (2d Cir. 1994).

[472] *Id.*

[473] *Id.*

[474] United States v. Escobar-De Jesus, 187 F.3d 148, 165 (1st Cir. 1999).

criminal enterprise, the First Circuit found no fault with the lower court's decision.[475] Other cases have required courts to consider whether there was a reasonable possibility of prejudice against Nigerians,[476] Italians or Sicilians,[477] Cape Verdeans,[478] Laotians,[479] defendants of different races married to one another,[480] and Russians, Armenians, and gypsies.[481] District courts occasionally find no "special circumstances" or "reasonable possibility" that prejudice will infect the trial,[482] but more often, it seems, trial judges are willing to ask a limited number of questions.

The reported cases reflect a wide range of approaches. At times, trial judges essentially lecture the jury.[483] Slightly more informative to the parties is a closed ended question such as "would any of you have any prejudices or biases that would prevent you from being fair and impartial in this case?"[484] or "will your decision in this case in any way be based

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[475] *Id.* at 156–57.

[476] *See, e.g.*, United States v. Okoronkwo, 46 F.3d 426, 433 (5th Cir. 1995).

[477] *See, e.g.*, United States v. Tocco, 200 F.3d 401, 411 (6th Cir. 2000).

[478] *See, e.g.*, Commonwealth v. Pina, 713 N.E.2d 944, 950 (Mass. 1999).

[479] *See, e.g.*, State v. Piansiaksone, 954 P.2d 861, 867 (Utah 1998).

[480] *See, e.g.*, United States v. Barber, 80 F.3d 964, 967 (4th Cir. 1996).

[481] *See, e.g.*, United States v. Sarkisian, 197 F.3d 966, 979 (9th Cir. 1999).

[482] *See, e.g.*, United States v. Brown, 938 F.2d 1482, 1486–87 (1st Cir. 1991) (affirming trial court, but stating that it would have been "more prudent" to inquire); United States v. Brooks, 957 F.2d 1138, 1145 (4th Cir. 1991) (holding that the evidence did not present a reasonable possibility of racial prejudice by the jury).

[483] *See, e.g.*, United States v. Groce, 682 F.2d 1359, 1363 n.3 (11th Cir. 1982) (analogizing to personal preference of ice cream flavors to explain racial bias to the jury pool). This, of course, would not be an abuse of discretion if there is no "reasonable possibility" that racial prejudice might infect the proceedings. United States v. Okoronkwo, 46 F.3d 426, 434 (5th Cir. 1995); *see also* United States v. Bear Runner, 502 F.2d 908, 912 (8th Cir. 1974) ("[T]he better practice in a sensitive case is to direct probing questions touching areas of possible prejudice to each individual juror.... Individual questioning is particularly necessary when the overall circumstances and surroundings suggest the possibility of racial bias.").

[484] *See, e.g.*, Medrano v. City of Los Angeles, 973 F.2d 1499, 1507 (9th Cir. 1992). There are many variations on this theme. *See, e.g.*, United States v. Barber, 80 F.3d 964, 969 (4th Cir. 1996) (discussing a trial judge's questions to jurors on whether they knew of any reason why they could not "hear the facts of this case fairly and impartially and render a just verdict"). Justice Stevens argued, in dissent, that such a general question "is not an adequate substitute for a specific inquiry; if it were, trial judges might be well advised simply to ask that question and nothing else." Rosales-Lopez v. United States, 451 U.S. 182, 203 n.8 (1981).

upon the race, religion or the ethnic background of the defendant?"[485] But often judges include some open-ended interrogation into racial prejudice.

In some cases, trial judges have done far more. One case in which "the circumstances of the case indicate that there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury" was *United States v. Salameh.*[486] Defendants were accused of various crimes related to the 1993 bombing of the World Trade Center. Given the notoriety of the crime and the potential for prejudice, defendants sought, and the trial judge included in voir dire, substantial questioning designed to discover bias against Muslims.[487] Indeed, the voir dire procedures undertaken by the court evidence a careful winnowing of the venire. On appeal defendants complained the trial judge did not ask a list of seventy-nine questions (in a written questionnaire) about possible bias against Arabs and Islamic Fundamentalists. The Second Circuit held the district court judge did not abuse his discretion in refusing to do that. It held that the judge's questions were sufficiently thorough, and the fact that additional questions would have aided defense counsel in exercising its peremptory challenges did not render the voir dire defective.[488]

E. State Law

These rules have not necessarily been followed in state courts, for a number of jurisdictions have developed their own standards on independent state grounds. For example, under the Colorado Constitution, "defense counsel [has] a right and an obligation to inquire into the racial views of the venire members in the interest of obtaining a fair and impartial jury."[489] Thus, questioning about racial bias has been required in a prosecution for contributing to the delinquency of a minor when there was no indication that the defendant and victim were of different races.[490]

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[485] United States v. McAnderson, 914 F.2d 934, 943 (7th Cir. 1990). Prospective jurors were also questioned regarding their knowledge of the Chicano street gang, *El Rukns*. *Id.*

[486] United States v. Salameh, 152 F.3d 88, 120 (2d Cir. 1998) (quoting *Rosales-Lopez*, 451 U.S. at 191).

[487] *See id.* at 120–21. Obviously, this case merges issues regarding religion with ethnicity and national origin. Defendants sought broader questioning on the latter two topics; the trial court focused principally on the former. *See id.*

[488] *Id.* at 121.

[489] People v. Baker, 924 P.2d 1186, 1191 (Colo. Ct. App. 1996).

[490] *See id.*; Maes v. District Court, 503 P.2d 621, 625 (Colo. 1972) (collecting cases).

Connecticut has also permitted extensive questioning about racial matters as a matter of state constitutional law. This has extended well beyond cases involving interracial, violent crime.[491] Indeed, its courts have said, "Our state, by constitutional provision, allows the questioning of each prospective juror individually by counsel, and, within that framework, counsel is entitled to interrogate on the subject of race prejudice."[492]

Other states have developed their rules as a matter of statutory interpretation. For example, Georgia reached the same result as *Turner v. Murray* on the basis of its own statutory requirements.[493] On the other hand, South Carolina, which has a similar statute regarding voir dire,[494] has read its law to permit a court to refuse to ask about racial bias in a murder case.[495]

The Massachusetts courts have rejected a constitutional right to inquire, but have established an elaborate set of requirements based on a rule of criminal procedure and a state statute.[496] The rule permits "a juror to be examined upon issues extraneous to the case if it appears that the juror's

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[491] State v. Tucker, 629 A.2d 1067, 1078 (Conn. 1993) ("[I]f a venireperson's response reveals an antagonism toward racial intermarriage the trial court should . . . extend substantial latitude to explorative inquiries.").

[492] State v. Marsh, 362 A.2d 523, 525 (Conn. 1975) (sale of narcotics); *see also* State v. Smith, 608 A.2d 63, 66–67 (Conn. 1992) (collecting cases).

[493] Legare v. State, 348 S.E.2d 881, 881–82 (Ga. 1986) (citing GA. CODE ANN. § 15-12-133 (1986)); Burgess v. State, 450 S.E.2d 680, 688 (Ga. 1994); Walker v. State, 449 S.E.2d 322, 324 (Ga. App. 1994).

[494] S.C. CODE ANN. § 14-7-1020 (Law. Co-op. 2003) provides: "The court shall, on motion of either party in the suit, examine on oath any person who is called as a juror therein to know whether he . . . is sensible of any bias or prejudice therein . . . ."

[495] *See* State v. Cason, 454 S.E.2d 888, 889 (S.C. 1995). The opinion reveals the victim was a black woman. *Id.* It does not say whether defendant was also black or whether the sentence was death. *See id.* The opinion cites both state and federal law to reach its result. *See id.* at 489–90. It seems to employ the "special circumstances" rule and to use federal law to help determine whether a "special circumstance" exists. *Id.*; *see also* State v. Gibbs, 228 S.E.2d 104, 105 (S.C. 1976) (involving a case in which certain voir dire questioning was denied in an interracial armed robbery).

[496] *See* Ristaino v. Ross, 424 U.S. 589, 593 (1976). Recall it was a Massachusetts state court, Commonwealth v. Ross, 282 N.E.2d 70 (Mass. 1972), decision that gave rise to *Ristaino* in which the Supreme Court ruled there is no constitutional right to ask about race bias unless special circumstances indicate a significant likelihood of prejudice. *Id.*

impartiality may have been affected by the extraneous issues."[497] The statute permits inquiry if relevant to learn whether a juror is "sensible of any bias or prejudice."[498] From the rule and the statute, detailed rules have been elaborated.

In *Commonwealth v. Sanders*, the Supreme Judicial Court held a trial court must, upon request, conduct an individual voir dire of prospective jurors in a case in which a defendant of one race is charged with raping a victim of another race.[499] *Sanders* drew on *Rosales-Lopez* and the First

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[497] MASS. R. CRIM. P. 20(b)(2).

[498] MASS. GEN. LAWS ch. 234, § 28 (2003). More fully stated, it reads:

> Upon motion of either party, the court shall, or the parties or their attorneys may under the direction of the court, examine on oath a person who is called as a juror therein, to learn whether he is related to either party or has any interest in the case, or has expressed or formed an opinion, or is sensible of any bias or prejudice, therein . . . .
>
> For the purpose of determining whether a juror stands indifferent in the case, if it appears that, as a result of the impact of considerations which may cause a decision or decisions to be made in whole or in part upon issues extraneous to the case, including, but not limited to, community attitudes, possible exposure to potentially prejudicial material or possibly preconceived opinions toward the credibility of certain classes of persons, the juror may not stand indifferent, the court shall, or the parties or their attorneys may, with the permission and under the direction of the court, examine the juror specifically with respect to such considerations, attitudes, exposure, opinions or any other matters which may, as aforesaid, cause a decision or decisions to be made in whole or in part upon issues extraneous to the issues in the case. Such examination may include a brief statement of the facts of the case, to the extent the facts are appropriate and relevant to the issue of such examination, and shall be conducted individually and outside the presence of other persons about to be called as jurors or already called.

Id.

[499] Commonwealth v. Sanders, 421 N.E.2d 436, 436–37 (Mass. 1981), *overruled in part by* Commonwealth v. Ramirez, 555 N.E.2d 2081 (Mass. 1990). The background to *Sanders* is important. As noted, the Massachusetts Supreme Judicial Court first decided *Ristaino* in 1972. *See* Commonwealth v. Ross, 282 N.E.2d 70 (Mass. 1972). When defendant petitioned for certiorari, the Supreme Court vacated and remanded for further consideration in light of *Ham*, which had been recently decided. *See* Ross v. Massachusetts, 410 U.S. 901, 901 (1973). On remand, the Supreme Judicial Court affirmed its earlier ruling. *See* Commonwealth v. Ross, 296 N.E. 2d 810, 816 (Mass. 1973). It distinguished *Ham* and determined the Constitution does not require racial inquiry absent "special circumstances." *See id.* at 815. But, it said, on non-constitutional grounds,

Circuit's statement that "interracial rape may be a 'classic catalyst of racial prejudice.' "[500] That was extended in subsequent cases to require such voir dire, upon request, in cases in which a defendant is charged with sexual offenses against children where the defendant and the victim are of different races,[501] cases of interracial murder,[502] and cases of "knowingly deriving support and maintenance from the earnings of a prostitute" in which the pimp and prostitute are of different races and the relationship involves physical violence.[503] Indeed, a later case summarized these cases as establishing a rule that cases involving "[a]cts of sex and violence between members of different races . . . 'requir[e] individual voir dire.' "[504] Each of these cases requires individualized voir dire outside the

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> when a defendant requests that the prospective jurors be questioned about their racial prejudice, the judge should make specific inquiries of counsel concerning the racial aspects of the case. . . . If it appears from such preliminary inquiries that the case might reasonably be expected to present factors involving possible racial prejudice, then the judge should question the prospective jurors in this area.

Id. at 816.

Ross successfully petitioned for habeas corpus. Ross v. Ristaino, 388 F. Supp. 99, 101 (D. Mass. 1979), *aff'd*, 508 F.2d 754 (1st Cir. 1974). While the case was making its way back to the Supreme Court, the Massachusetts legislature amended MASS. GEN. LAWS ch. 234 § 28. It changed "may" to "shall" in the phrase "the court [may] shall . . . examine the juror specifically with respect to such . . . attitudes." *Id.*; *see supra* note 498. The Supreme Court then reversed the First Circuit's grant of habeas, holding the constitution does not require racial voir dire. *Ristanio*, 424 U.S. at 597. However, five years later it decided *Rosales-Lopez*, drawing the distinction between constitutional requirements and supervisory powers that had been elaborated in some of these Massachusetts cases. Rosales-Lopez v. United States, 451 U.S. 182 (1981). Six weeks later, *Sanders* was decided.

[500] *Sanders*, 421 N.E.2d at 438 (quoting Dukes v. Waitkevitch, 536 F.2d 469, 471 (1st Cir. 1976)).

[501] *See* Commonwealth v. Hobbs, 434 N.E.2d 633, 641 (Mass. 1982).

[502] *See* Commonwealth v. Young, 517 N.E.2d 130, 136 (Mass. 1987).

[503] *See* Commonwealth v. Stephens, 446 N.E.2d 410, 411 (Mass. App. Ct. 1983). This case framed the general rule that "cases . . . [that] involve both sex and violence between members of different races, also present as a matter of law 'a substantial risk that extraneous issues will influence the jury.' " *See id.* at 413 (quoting *Sanders*, 421 N.E.2d at 438).

[504] Commonwealth v. Ramos, 577 N.E.2d 1012, 1013 (Mass. App. Ct. 1991) (quoting *Stephens*, 446 N.E.2d at 410).

presence of other jurors. General inquiry of the jury panel as a whole is insufficient.

Before this interrogation occurs, however, the trial judge must be sure the defendant understands the risks of injecting race into the case.

> [B]efore granting a motion for such questioning the trial judge must determine sua sponte that the defendant has been informed of, and understands, the risks and potential danger of this type of voir dire. Thus, a valid request for individualized interrogation . . . imposes, by itself, a duty on the trial judge to engage in a colloquy with the defendant.[505]

The court quoted an earlier decision, explaining that racial inquiry "'may activate latent racial bias in certain prospective jurors or may insult others without uncovering evidence of bias in hard-core bigots who refuse to acknowledge their prejudice.' "[506]

But even while Massachusetts has been elaborating these rules, it has consciously refused to expand its holdings to cover inquiry in inter-ethnic cases. It has held that "[t]he word, 'Hispanic,' ordinarily refers, not to race, but to national origin."[507] Thus, a case in which a Hispanic male was charged with sex crimes against a white victim was not an "interracial" crime, and the rules of *Sanders* and *Hobbs* did not extend to it.[508] The court expressly recognized that this was a narrower view than federal courts take pursuant to *Rosales-Lopez*, and it did not foreclose the possibility that the trial judge might permit inquiry if the case appears to warrant it. It refused, however, to *require* inquiry on the basis of the precedents discussed above.[509] The concurring opinion observed that nothing in the

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[505] Commonwealth v. A Juvenile, 485 N.E.2d 170, 175 (Mass. 1985). A subsequent decision of the Massachusettes high court held that a judge is not required to conduct a colloquy. Commonwealth v. Ramirez, 555 N.E.2d 208, 209 (Mass. 1990).

[506] *See id.* (quoting *Sanders*, 421 N.E.2d at 438).

[507] Commonwealth v. De La Cruz, 540 N.E.2d 168, 170 (Mass. 1989). The murder of a Hispanic man by a black man is "interracial." *Young*, 517 N.E.2d at 130, 135.

[508] *De La Cruz*, 540 N.E.2d at 171.

[509] *See id.*; *accord* Commonwealth v. Ortiz, 716 N.E.d 659, 663 (Mass. App. Ct. 1999). Something else may be at work here. Over time, the extent to which a jurisdiction permits voir dire may expand and contract as abuses of too much and then too little questioning drive decisions. It appears the Massachusetts courts took an expansive view of racial voir dire beginning in the 1970s and continuing through most of the 1980s, when the *Ross*, *Sanders*, *Hobbs*, and *Young* line of

Massachusetts statute limits the court's concern to racial prejudice.[510]

Other state appellate courts have exercised their "supervisory authority" to create such rules. For example, Maryland expressly adopted a rule broader than *Ristaino* as a matter of state nonconstitutional criminal law. Exercising its supervisory authority over state courts, the Maryland high court held that questioning as to racial prejudice was required in a prosecution of an African-American for possession of cocaine.[511] It is not necessary that there be an interracial, violent crime; voir dire should be permitted at the request of the defendant, to discover if any potential juror harbors a disqualifying bias.[512] New Jersey law is similar. "Even in cases with no interracial crime or obvious racial overtones, this Court has stated that it prefers a searching inquiry into racial bias, if so requested by the defendant."[513]

Seemingly exercising its supervisory powers over lower courts, the Arkansas Court of Appeals has required questioning about racial bias in a case in which a black man was charged with delivery of a controlled substance.[514] However, even the development of independent

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cases was being developed. In later years, however, the court seems to be rethinking the efficacy of that, and taking a more narrow view; *see also* Commonwealth v. Grice, 574 N.E.2d 367, 369 (Mass. 1991) (refusing to extend *Sanders*, *Hobbs,* and *Young* to interracial armed robbery); Commonwealth v. Ramos, 577 N.E.2d 1012, 1014 (Mass. App. Ct. 1991) (finding trial for assault and battery with a dangerous weapon and assault with intent to murder was "racially neutral" where race of defendant was "uncertain"). *But see* Commonwealth v. La Faille, 704 N.E.2d 206, 210 (Mass. App. Ct.) (intermediate appellate court requiring questioning in case of interracial assault and battery by means of a dangerous weapon), *rev'd on other grounds*, 712 N.E.2d 590 (Mass. 1999).

[510] *See De La Cruz*, 540 N.E.2d at 172 (Liacos, J., concurring).

[511] Hill v. State, 661 A.2d 1164, 1169 (Md. 1995); *see also* Bowie v. State, 595 A.2d 448, 453 (Md. 1991) (holding that questioning as to racial prejudice is required in a trial of an African-American charged with murder) and cases cited therein.

[512] *Hill*, 661 A.2d at 1168–69.

[513] State v. McDougald, 577 A.2d 419, 434 (N.J. 1990) (involving a murder case in which the defendant and victims are of same race) (citing State v. Ramseur, 524 A.2d 188, 250 (N.J. 1988)); *accord* State v. Loftin, 680 A.2d 677, 736–39 (N.J. 1996) (O'Hern, J., dissenting) (collecting capital cases); State v. Horcey, 629 A.2d 1367, 1370–71 (N.J. Super. App. Div. 1993) (collecting cases).

[514] *See* Smith v. State, 800 S.W.2d 440, 441 (Ark. Ct. App. 1990); *see also* Cochran v. State, 505 S.W.2d. 520, 521 (Ark. 1974) (holding that voir dire questioning on racial prejudice is required when an African-American defendant is charged with assaulting a Caucasian police officer).

state law may draw upon the federal constitutional principles discussed above. [515]

Finally, states may resolve these issues, in whole or in part, in rules of court or similar standards. For example, the California Standards of Judicial Administration suggest that courts ask, in appropriate cases:

> It may appear that one or more of the parties, attorneys or witnesses come from a particular national, racial or religious group (or may have a life style different from your own). Would this in any way affect your judgment or the weight and credibility you would give to their testimony?[516]

As in the cases involving religion and politics, courts must sometimes be careful to prevent voir dire from being used to sow prejudice. For example, the North Dakota Supreme Court reversed the conviction of an Iranian-born defendant.[517] The trial took place in 1980, just five months after the American Embassy in Teheran was seized and while Americans were still held hostage. During voir dire, the overzealous prosecutor asked prospective jurors about the Koran and whether they had "ever heard the phrase 'Death to the infidel'."[518] The questions were clearly designed to prejudice the jurors against defendant. Although the trial judge succumbed, the supreme court properly overruled that.[519]

F. Summary of Observations

As noted at the outset of this article, trial judges are afforded considerable discretion. They are rarely reversed for asking (or failing to ask) about religious and political issues, but that is not necessarily true of inquiry

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[515] *See, e.g.*, State v. Lamar, 698 P.2d 735, 740–41 (Ariz. Ct. App. 1984) (unclear whether applying federal constitutional law or state standards); State v. Lopez, 657 P.2d 882, 884–85 (Ariz. Ct. App. 1982) (unclear whether applying federal constitutional law or state standard); State v. Piansiaksone, 954 P.2d 861, 868 (Utah 1998) (Laotian defendant convicted of murder in which the trial judge asked closed-end questions); State v. Davis, 10 P.3d 977, 999 (Wash. 2000) (murder of Japanese-American by African-American in which it was held that the trial judge had no duty to inquire, sua sponte, into racial prejudice where the defense counsel failed to do so during extensive voir dire).

[516] CAL. R. CT. § 8.5(b)(18).

[517] State v. Mehralian, 301 N.W.2d 409, 419 (N.D. 1981).

[518] *Id.* at 413.

[519] *Id.* at 419.

regarding racial bias. The question then, is how should courts approach this problem.

At base, there is a problem of knowledge, self-knowledge, and willingness to confess prejudice. When jurors are called into a courtroom, generally, they know nothing about the case, the trial participants, or the facts as to which they might harbor some relevant prejudice.[520] As voir dire unfolds, the court provides more information, but at any given moment a juror may not know enough about the case to know whether something about it will touch a particular bias. Thus, it is necessary for judges to be alert to provide sufficient information about the case if jurors are to be able to respond to questions about bias.

Equally important, jurors may not be aware of their own prejudice or may be embarrassed or unable to admit it.[521] Justice Marshall canvassed some of this learning in his dissent in *Mu'Min*.

> [A] prospective juror's *own* "assurances that he is equal to the task cannot be dispositive of the accused's rights." As Justice O'Connor has observed in *Smith v. Phillips*, an individual "juror may have an interest in concealing his own bias . . . [or] may be unaware of it." "Natural human pride would suggest a negative answer to whether there was a reason the juror could not be fair and impartial."[522]

Regardless of these failings, there is no place to begin other than by asking a juror about his biases. "As the juror best knows the condition of his own mind, no satisfactory conclusion can be arrived at, without resort

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[520] "All trial lawyers, and all students of the science of jurisprudence, know that general questions directed to the jury panel, or to individual jurors, by a judge who at the beginning of the trial has no special information regarding the issues, or the relationship of the parties, or the attending circumstances, sometimes fail to elicit answers which may cause even the most conscientious juror to reveal an existing prejudicial status." Cochran v. State, 505 S.W.2d 520, 521 (Ark. 1974) (quoting Griffin v. State, 389 S.W.2d 900, 902 (Ark. 1965)).

[521] "[N]o man is a villain in his own eyes." JAMES BALDWIN, BLUES FOR MR. CHARLIE 6 (1964); *see* State v. Tucker, 629 A.2d 1067, 1077–78 (Conn. 1993) ("A juror is not likely to admit being a prejudiced person . . . and indeed might not recognize the extent to which unconscious racial stereotypes might affect his or her evaluation of a defendant of a different race . . . .").

[522] Mu'Min v. Virginia, 500 U.S. 415, 440 (1991) (Marshall, J., dissenting) (alteration and omission in original) (citations omitted). *But see* Irvin v. Dowd, 366 U.S. 717, 728 (1961) ("No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father.").

to himself. Applying this test then, how is it possible to ascertain whether he is prejudiced or not, unless questions similar to the foregoing are propounded to him?"[523]

Justice Marshall identified another strand to this problem of self-knowledge. A juror may not be aware of her own bias because the issue of impartiality is, to some extent, a mixed question of law and fact.[524] A juror may accept his attitudes as facts of life while the law regards those same attitudes as biases.[525]

This argument is sometimes answered by judges who observe that jurors have confessed bias in the case at bar. Therefore, the argument goes, the questioning must have been sufficient. That, however, assumes the same amount of questioning is sufficient to discover bias in each juror. Trial lawyers know that is simply not so. Some jurors are just more candid than others, and others are more than candid. Every trial lawyer has seen citizens who wish to be excused from jury service "confess" to prejudice, sometimes even before being asked.

Regardless of how candid some jurors may be, it does not change the fact that other jurors may conceal a fact or a prejudice, whether advertently or not. A juror may honestly misunderstand a question, and therefore fail to disclose a fact sought by counsel,[526] or a juror may not consider his or her own bias to be a prejudice, an attitude that would give counsel pause.[527]

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[523] People v. Reyes, 5 Cal. 347, 349 (1855), *quoted with approval in* Aldridge v. United States, 283 U.S. 308, 313 n.3 (1931). Contrast this with Learned Hand's observation that courts do not have time "to probe more than the upper levels of a juror's mind." *See* United States v. Dennis, 183 F.2d 201, 227 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

[524] *Mu'Min*, 500 U.S. at 442–43.

> One of the reasons that a "juror may be unaware of" his own bias is that the issue of impartiality is a mixed question of law and fact, the resolution of which necessarily draws upon the *trial court's* legal expertise. Where, as in this case, a trial court asks a prospective juror merely whether he can be "impartial," the court may well get an answer that is the product of the juror's own confusion as to what impartiality is.

Id. (citations omitted).

[525] See, for example, Judge Calabrese's discussions of implied and inferred bias in *United States v. Torres*, 128 F.2d 38, 47 (2d Cir. 1997).

[526] In *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), a juror misinterpreted a question asked by counsel and therefore remained silent when, arguably, he should have provided a bit of information. *Id.* at 552–53.

[527] *See, e.g.*, United States v. Cerrato-Reyes, 176 F.3d 1253, 1259 (10th Cir. 1999) (involving a juror who "arguably should have provided [certain] information, [but] her failure to do so was at most a good faith mistake").

On occasion a juror might simply lie.[528] These concealments are not easily rectified. For, even though the Supreme Court has said "[t]he necessity of truthful answers . . . is obvious,"[529] it has set forth a relatively restrictive standard of review of such matters:

> [T]o obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.[530]

Thus, unless prejudice is ferreted out during voir dire, it is not likely that the possible error will be cured on appeal. Additionally, as the First Circuit observed, "we do not allow the possibility of a false answer to serve as an excuse for not asking these questions."[531]

To some extent, this is a matter of credibility. Normally, issues of credibility are tested by questioning. If there is any serious issue about whether a juror harbors a disqualifying prejudice, the court or counsel

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[528] *See* Gaba, *supra* note 10, at 532 ("Venirepeople do not always tell the truth on voir dire—in such a public setting there is the obvious temptation not to admit being prejudiced."); Eileen C. Moore, *Judicial Voir Dire More Important Than Ever*, 13 CAL. LITIG. 45, 45 (2000) ("I have concluded from my experience as a trial judge . . . that, perhaps due to political correctness, agendas or disgust with the system, many jurors either attempt to hide their true feelings, or approach their task with preconceptions, cynicism and activism."); Jerry Markon, *Jurors With Hidden Agendas*, WALL ST. J., July 31, 2001, at B1.

[529] *McDonough*, 464 U.S. at 554.

[530] *Id.* at 556; *accord* Pope v. Man Data, Inc., 209 F.3d 1161, 1164 (9th Cir. 2000). *Compare In re* Hitchings, 860 P.2d 466, 481 (Cal. 1993) (holding that concealment of material information on voir dire and discussion of the case amongst jurors gives rise to a presumption of prejudice), *and* Wiley v. S. Pac. Transp. Co., 220 Cal. App. 3d 177, 189 (Cal. Ct. App. 1990) ("[A] juror's intentional concealment of relevant facts or giving false answers during the voir dire examination constitutes misconduct and raises a presumption of prejudice."), *with In re Hamilton*, 975 P.2d 600, 614 (Cal. 1999) ("Still, whether an individual verdict must be overturned for jury misconduct or irregularity is resolved by reference to the substantial likelihood test, an objective standard. Any presumption of prejudice is rebutted and the verdict will not be disturbed, if the entire record . . . indicates there is no probability of prejudice.") (citations and internal quotations omitted).

[531] Ross v. Ristaino, 508 F.2d 754, 757 (1st Cir. 1974).

should be alert to make careful inquiry. As with any other question of the credibility of a witness, the trial judge has an advantage an appellate court lacks—the ability to see and hear the witness, observe his demeanor, and judge his candor.

Given this, Justice Kennedy noted an important limit on an appellate court's willingness to defer to a trial court: "Our willingness to accord substantial deference to a trial court's finding of juror impartiality rests on our expectation that the trial court will conduct a sufficient *voir dire* to determine the credibility of a juror professing to be impartial."[532] In other words, if there is no informed judgment below, then deference is not warranted.[533]

No rule can prescribe how much questioning is sufficient for all purposes, and there are competing considerations. Some judges are concerned that inquiring about race or ethnicity actually gives prejudicial attitudes more credence. In *Rosales-Lopez* Justice White noted the consumption of time such questioning might consume. Then, he observed:

> [A] more significant conflict . . . involv[es] the appearance of justice . . . . [R]equiring an inquiry in every case is likely to create the impression "that justice in a court of law may turn upon the pigmentation of skin [or] the accident of birth." Trial judges are understandably hesitant to introduce such a suggestion into their courtrooms.[534]

The competing view was stated in *Aldridge*.

> The argument is advanced on behalf of the government that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices. We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.[535]

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[532] Mu'Min v. Virginia, 500 U.S. 415, 451 (1991) (Kennedy, J., dissenting).

[533] Justice O'Connor responded to this by saying: "As we observed in *Patton v. Yount*, credibility determinations of this kind are entitled to 'special deference' and will be reversed only for 'manifest error.'" *Id.* at 433 (citations omitted).

[534] Rosales-Lopez v. United States, 451 U.S. 182, 191 (1981) (quoting *Ristaino*, 508 F.2d at 596 n.8) (alterations in original) (citations omitted).

[535] Aldridge v. United States, 283 U.S. 308, 314–15 (1931).

Justice White agreed, noting that "if the defendant claims a meaningful ethnic difference between himself and the victim, his *voir dire* request should ordinarily be satisfied."[536]

Although the Supreme Court has limited the scope of the Constitution's protection, it has provided federal trial courts with latitude to deal with these problems. While *Ristaino* and *Rosales-Lopez* require one to look at the circumstances of the case and the likelihood of prejudice in the community (rather than prejudice against the individual) to determine if there is a *constitutional* violation, *Rosales-Lopez* makes it clear that the *nonconstitutional* standard embraces the possibility that an individual juror may be prejudiced against the individual, regardless of the nature of the case.[537] Additionally, while the *constitutional* standard looks for a "significant likelihood" that the jurors might not be impartial, the *nonconstitutional* standard requires only a "reasonable possibility" of that. As many state courts have found, there is little reason to limit inquiry to some artificial class of cases, such as interracial violence. If there is a cognizable risk that an individual juror is prejudiced against a party or a witness, then that should be discovered during voir dire.

CONCLUSIONS

At the outset, it was noted that the trial court's discretion is limited by a party's right to information sufficient to inform a challenge, while the party's right to ask is limited by the trial judge's very broad discretion. This, however, does not leave courts and litigants free to clash on terrain with no other rules or guidance. There are clearly a number of considerations that must be weighed in determining what inquiry to allow and it is possible to distill some learning from the cases to guide future courts.

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[536] *Rosales-Lopez*, 451 U.S. at 191 n.7.

[537] *See id.* at 197. This was a point that divided the majority from the dissent in *Rosales-Lopez*. Justice Stevens, in dissent, quarreled with the notion that the Constitution requires " 'special circumstances' connected with an alleged criminal transaction indicating an unusual risk of racial or other group bias." *See id.* He thought the court should acknowledge "there are many potential jurors who harbor strong prejudices against all members of certain racial, religious, or ethnic groups for no reason other than hostility to the group as a whole. . . . [A] member of the Nazi Party should not be allowed to sit in judgment on a Jewish defendant" regardless of whether the facts of the case raise issues relevant to that prejudice. *Id.* at 196–97.

A. Limiting Factors

Courts invoke a number of factors in support of arguments to limit voir dire. One is intensely practical: minimizing the consumption of time it takes to empanel a jury. Those charged with the administration of justice must manage courts as efficiently as possible, consistent with actually administering justice. At times, this becomes a rationale to cabin attorney voir dire. It is said that lawyers cannot question jurors as effectively as judges—that lawyers waste time asking about irrelevant, peripheral matters. Not only does it waste the time of busy judges, the argument runs, but it also tries the patience of potential jurors who have given their time to serve. Unduly prolonged voir dire arguably lowers the public's opinion of the justice system.[538] A subspecies of this argument is that questioning, limited to a "reasonable" amount of time, cannot really uncover bias; it can only expose what is in the "upper levels of a juror's mind."

A second set of arguments relates to the perceived need to protect the privacy of jurors. The Supreme Court has recognized that jurors may have "legitimate privacy interests."[539] An argument can be made that jurors have a right to "informational privacy" that must, sometimes, be weighed against the parties' need to inquire.[540] In practice, it is clear that courts must often safeguard jurors from embarrassing, intrusive questions. Opposing counsel may not have adverse interests when it comes to seeking information from prospective jurors. Both sides tend to be interested in having more, rather

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[538] In *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 511 n.9 (1984), the Court noted that voir dire had lasted six weeks. It stated:

> We cannot fail to observe that a *voir dire* process of such length, in and of itself, undermines public confidence in the courts and the legal profession. . . . Properly conducted it is inconceivable that the process could extend over such a period. We note, however, that in response to questions counsel stated that it is is not unknown in California courts for jury selection to extend six months.

Id. at 510 n.9.

[539] *See id.* at 512; *id.* at 520 (Marshall, J., concurring). Note, however, that Justice Blackmun, while concurring, was careful to observe, "the Court does not decide, nor does this case require it to address the asserted 'right to privacy of the prospective jurors.'" *See id.* at 514 (Blackmun, J., concurring); *see also* Glover, *supra* note 9, at 709–13 (discussing a prospective juror's right to privacy).

[540] *See* Nixon v. Adm'r Gen. Servs., 433 U.S. 425, 441 (1977); Whalen v. Roe, 429 U.S. 589, 602 (1977); Glover, *supra* note 9, at 717; Lynd, *supra* note 10, at 257–60.

than less, information.[541] Thus, it becomes, uniquely, the duty of the trial judge to be alert to the privacy of the jurors.

A variant on the privacy factor has arisen in a number of criminal cases in which the trial judge worried about the safety of the jurors. In *Barnes* and similar cases, the court empaneled anonymous jurors and limited the information that could be made known during voir dire.[542]

Courts are also concerned about suggesting prejudice or injecting false issues into trial. This argument has appeared in cases involving religion,[543] politics,[544] and race.[545] With regard to politics, Justice Harlan made the seminal statement in *Connors* suggesting that a trial court should avoid creating the impression that the political party to which defendant belonged was somehow involved in the trial.[546] In the cases concerning race, this crops up repeatedly.[547]

Courts also tend to limit voir dire if the questioning seems designed to lead to a challenge on impermissible grounds. For example, the trial court in *Chapin* refused to permit counsel to discover the jurors' political affiliation,[548] and in an extreme example, the court in *McDade* struck from a proposed questionnaire a question that simply asked if the juror was male or female.[549]

Finally, some courts are simply limited by statute. For example, in criminal cases in California, questions may be asked only to discover grounds for a challenge for cause.[550]

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[541] United States v. McDade, 929 F. Supp. 815, 817 (E.D. Pa. 1996) ("[W]hen it comes to prying into matters personal to a juror, the interests of counsel on either side of the aisle are not necessarily antagonistic. All the lawyers want to learn just about all they can about the prospective jurors."); *see also* United States v. Padilla-Valenzuela, 896 F. Supp. 968, 971 (D. Ariz. 1995) (stating that a trial lawyers desire for information is "insatiable,"). Actually, the belief that more information will always help a party is not entirely true. One party may be "profiling" jurors based on a different set of factors than the other party. Sometimes the jury consultants for both sides stumble on a factor they believe is particularly instructive for one side, but not the other. In that circumstance, one party may resist the other's efforts to discover that fact.

[542] *See supra* notes 376–84 and accompanying text.

[543] *See supra* note 68; *supra* notes 66–68 and accompanying text.

[544] *See, e.g.*, Connors v. State, 158 U.S. 408, 415 (1895).

[545] *See, e.g.*, Ristaino v. Ross, 424 U.S. 589, 596 (1976).

[546] *See supra* note 148 and accompanying text.

[547] *See supra* note 431 and accompanying text.

[548] *See supra* note 172 and accompanying text.

[549] United States v. McDade, 929 F. Supp. 815, 816–17 (E.D. Pa. 1996).

[550] *See supra* note 25.

B. Expansive Factors

Each of these arguments has a counter. To those who worry that prolonged voir dire brings disrespect to the courts, others reply that "the public's response to the use of unusually elaborate procedures to protect the rights of the accused might well be, not lessened confidence in the courts, but rather heightened respect for the judiciary's unshakable commitment to the ideals of due process."[551] Surely jurors who are subject to brief, closed-end questions by a judge who appears in a rush to fill the jury box cannot think their biases have been exposed. It brings disrespect to the system to have jurors tell their friends they were able to serve on a jury despite the fact that they were able to bring strong, relevant, undiscovered biases into deliberations. Experience shows that voir dire can often expose prejudices. The fact that it may not detect all bias is no reason to limit the effort unduly.

Undue intrusion into a juror's privacy is clearly an important concern, but there are competing concerns. As the Court said in *Press-Enterprise*, one of the strengths of our justice system is that trials are conducted in public.[552] Justice is not only done, but seen to be done. Voir dire has been a part of that tradition, and there are a number of devices to ameliorate the privacy concern including the use of questionnaires, inquiry at sidebar or in chambers, and ultimately the redaction of sensitive information in a transcript.[553]

The concern about injecting false issues into trial has been handled differently in cases regarding race, on the one hand, and politics and religion on the other. In the former, Chief Justice Hughes' admonition in *Aldridge* has been persuasive.[554] This can be seen in *Rosales-Lopez* where Justice White said that the defendant should be permitted to choose whether he wants to raise these issues on voir dire when there is a concern about ethnic or racial bias.[555] Although we do not afford defendants the

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[551] Press-Enter. Co. v. Superior Court, 464 U.S. 501, 522 (1984) (Marshall, J., concurring).

[552] *Id.* at 505.

[553] Indeed, if a juror shows unusual sensitivity to being asked certain questions that the court deems relevant, that juror may simply be excused from that case and returned to the jury assembly room for assignment to another trial court.

[554] Aldridge v. United States, 283 U.S. 308, 314–15 (1931).

[555] The dissent in *Rosales-Lopez* objected to the functional limitation placed on appellate review of this principle, see Rosales-Lopez v. United States, 451 U.S. 182, 201–02 (Stevens, J., dissenting), insofar as the plurality opinion held that

same option in cases involving political or religious bias, Chief Justice Hughes' teaching could be read to cover those situations as well. Indeed, the concern about voir dire "suggesting prejudice" may sometimes be remedied by extending voir dire. The inquiry itself can serve to impress upon prospective jurors the need to be fair and open-minded.

The notion that some questions should not be asked because they can only lead to challenges on impermissible grounds can be overstated. *Chapin* is one of the few cases that suggests it would be a violation of First Amendment freedom of association to say, on voir dire, to what political party one belongs.[556] *McDade*'s refusal to include gender on the questionnaire must be read as almost tongue-in-cheek, unless the court was prepared to conceal prospective jurors from the litigants' view.

Sometimes, the notion that a question should not be asked is a conclusion, not a reason. For example, in *Ham* one could have said the racial questioning was improper because the case was simply a prosecution for possession of marijuana. Framing the issue so narrowly can lead to an erroneous conclusion.

While there are jurisdictions that limit inquiry as a matter of statute, there are others that expand it legislatively or as a matter of state constitutional law.[557]

There are other reasons to permit inquiry. The less a lawyer knows of the views of the prospective juror, the more that lawyer is forced to rely upon his or her own prejudices, stereotypes, and judgments based on appearance, body language, and other non-verbal factors. Given the difficulty of ferreting out prejudices, sometimes close questioning is required to determine if a juror is really "indifferent as he stands unsworne."[558]

And ultimately, of course, the purpose of voir dire is to help assure that a case is judged by a fair and impartial jury. The factors invoked to limit questioning must be tested against this most fundamental guarantee.

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failure to ask such questions is not reversible error unless the trial involves an interracial violent crime or "the circumstances of the case indicate there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury." *Id.* at 191.

[556] United States v. Chapin, 515 F.2d 1274, 1289 (D.C. Cir. 1975). Indeed, *Chapin* observed voter registration information was publicly available in that jurisdiction. *Id.* at 1290.

[557] *See supra* notes 489–92 and accompanying text.

[558] *See* Ristaino v. Ross, 424 U.S. 589, 596 (1976) (quoting COKE ON LITTLETON, *supra* note 414.

C. *Constitutional Standards*

The Sixth, Seventh, and Fourteenth Amendments all provide constitutional guarantees of due process and fair trial. Thus, notions of fundamental fairness underlie many of the cases regarding voir dire, but it is only in cases involving immutable characteristics (race, ethnicity, and gender) that constitutional standards have been brought into play in any more detailed fashion.

Partly, this is a matter of history. As the Court noted in *Ham*, "a principal purpose of . . . the Fourteenth Amendment was to prohibit States from invidiously discriminating on the basis of race."[559] Decades of legal battles were fought to integrate our juries.[560] This spawned many constitutional decisions about the composition of juries, initially focused on race, but ultimately including questions of gender and ethnicity. Thus, it was impossible for the Court to ignore the possibility of constitutionally significant prejudice when it was raised in cases such as *Aldridge* and *Ham*.

Faced with such a history, the Supreme Court has, with some reluctance, elucidated certain minimal constitutional requirements for inquiry in cases of interracial crime presenting "special circumstances" that raise a constitutionally significant likelihood that jurors would not be indifferent.

Part of the reason there is not more constitutional law on the subject, however, may be that the development of the law has been deflected to evaluation under the "supervisory powers" of the appellate courts. To the extent that the courts have elaborated supervisory rules that encourage or require questioning, they have avoided confronting constitutional claims. Note, however, the difference between the federal constitutional standard (a "constitutionally significant likelihood of prejudice") and the federal supervisory standard ("reasonable possibility" of prejudice) while real, may not be that great in practice.

How then, are courts to consider and apply these standards? The key to the development of these rules is often the concept of relevance, broadly understood.

D. *Relevance*

As one court said,

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[559] Ham v. South Carolina, 409 U.S. 524, 526–27 (1973).

[560] *See supra* notes 332–44 and accompanying text.

> an intrusion into the prospective jurors' personal and private thoughts is warranted when a question has great probative value with respect to the issues in the case or the ability of the prospective juror to be fair, unburdened by strongly-held opinions. But as the connection between the voir dire question and matters of actual bias or fair-mindedness becomes attenuated, the intrusion into the prospective juror's personal and private thoughts cannot be sanctioned. And when the inquiry has no obvious relevance to actual bias or fair-mindedness, the inquiry should be disallowed.[561]

Courts have looked to factors raised directly by a case (internal circumstances) and those surrounding the case (external circumstances) to help determine relevance.

Weaving through the religious, political, racial, and ethnic cases is a strong view that courts should consider whether the circumstances of the case give rise to concerns about prejudice that require questioning. Judges and lawyers are enjoined to understand enough about the presentation of the case—before the jurors are called into the courtroom—to determine whether it is going to require consideration of bias on voir dire.

To determine whether there is a "reasonable possibility" that the case raises issues of bias, the judge must evaluate the temper of the community with respect to both the participants in the trial and the issues raised by the case. Consequently, courts have weighed whether a party (or, if relevant, a witness, victim, or lawyer) is a member of a religious, political, racial, or ethnic group as to which some jurors may harbor bias.

Courts must also consider the circumstances surrounding the case to determine whether questioning about religious, political, or racial bias is required. When there were disturbances at Wounded Knee, the court ruled there should be inquiry into the possibility of prejudice against a Native American defendant even though neither he nor the case had any connection to those events.[562] When a Hispanic defendant was charged with smuggling illegal aliens in a trial near the Mexican border, the court urged inquiry about "aliens" and "the alien problem."[563] Similarly, in *Connors*, Justice Harlan would have permitted questioning if there was reason to believe the Committee of One Hundred was "behind the prosecution of the

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[561] United States v. Serafini, 57 F. Supp. 2d 108, 112 (M.D. Pa. 1999).

[562] *See* discussion of *Bear Runner*, *supra* notes 467–69 and accompanying text.

[563] *See* discussion of *Rosales-Lopez*, *supra* notes 432–47 and accompanying text.

defendant."[564] Today, in the wake of the September 11, 2001 attack on the World Trade Center, it is clear that courts must inquire more closely into bias against Muslims, Islamic Fundamentalists, and persons of certain ethnicities.[565]

But judging the "temper of the community" is not always easy. The fever can be chronic or acute. Sometimes the community bias against a group of people is acute and manifest. This is especially true in the political cases. For example, it was socially acceptable (in many circles) to be biased against anarchists at the turn of the century or communists in the 1950s. Jurors would not necessarily conceal these biases. When it is popular or common to be biased, determining the temper of the community may be easy but not all biases are so readily confessed.

As noted above, jurors may not recognize or be willing to admit a bias. Courts have dealt with this in two ways: some have focused only on the issues in the case; others have permitted questioning based simply on the characteristics of the trial participants. Both should be considered.

Courts properly consider whether the issues raise a particular need to inquire. The polygamy cases forced courts to worry about the jurors' beliefs—based in religious faith—to insure a fair trial. Similarly, where a trial involved issues of political corruption, courts have permitted some inquiry. In racial cases, courts have been worried that certain kinds of inter-racial crime are more likely than others to wake feelings of bias that might otherwise be dormant.

While consideration of the issues has not led to categorical rules in the area of politics and religion, it has with respect to race. The federal view has been to permit inquiry in cases involving inter-racial (or inter-ethnic) violence if a defendant asks. The Massachusetts rule permits inquiry in cases involving inter-racial (but not inter-ethnic) sex and violence. Other jurisdictions have not made such fine distinctions. They have required such questioning regardless of whether there has been an inter-racial or inter-ethnic crime of sex or violence.

States such as Colorado, Connecticut, and New Jersey reject these distinctions. They permit questioning when the defendant may be the object of prejudice, regardless of the issue in the case. The principle behind the latter rule is easy to state: If a juror is prejudiced against a defendant, he

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[564] Conners v. State, 158 U.S. 408, 415 (1895); *see also supra* notes 141–54 and accompanying text (discussing Harlan's opinion in *Conners*).

[565] United States v. Salameh, 152 F.3d 88 (2d Cir. 1998); State v. Mehralian, 301 N.W.2d 409 (N.D. 1981); *see supra* note 2 and accompanying text.

should not judge a case of larceny any more than a case of rape. We want jurors to be unbiased in all cases, not just certain categories of cases.

Courts have sometimes framed this as a choice between two undesirable outcomes: giving the jury the impression "that justice in a court of law may turn upon the pigmentation of skin [or] the accident of birth," or giving a party reason to believe the jury was prejudiced against him or his case.[566] It is not clear that permitting inquiry into bias creates the impression *Rosales-Lopez* articulates, and it hardly seems sufficient reason to permit a biased juror to judge a case, but to a considerable extent, the choice hypothesized by courts is a false one. Judges can, and should, use the introduction to voir dire to explain that justice requires jurors without disqualifying bias. They can ameliorate the problem by giving jurors a description of the case before voir dire begins. Trial courts can minimize the risk that jurors overemphasize religion, politics, race, or ethnicity by explaining why these questions are asked, and how they help to insure due process. If the jurors understand why they are being asked these questions, they are likely to be more understanding and cooperative.

In appropriate cases, courts should use questionnaires to obtain relevant information relatively quickly and without concern of public embarrassment. In addition, the court should explain that prospective jurors can be questioned individually, in chambers if they wish, to avoid embarrassment about some particular matter.

At the start of voir dire, judges should also explain to the venire something about the case they may hear. Who are the parties? What are the issues? The judge should explain enough to give the prospective jurors an understanding of which of their biases may be relevant to voir dire. Jurors can cooperate better if they are not asked simply to guess if there is a reason they cannot judge the case fairly.

Lawyers, too, can help clear the air during voir dire. Observe, for example, how the lawyer in *Spies* obtained a commitment from the jurors that they would not allow their prejudice against anarchists to prevent them from judging the particular case before them.[567] Voir dire, properly used, can help to reduce prejudice, not incite it.

Courts and counsel must take care, however, to do this with tact and sensitivity. Clumsy speeches, or rambling, poorly focused questions will not do the job and may even exacerbate the problem.

There is no question that voir dire can be abused. Lawyers may try to precondition jurors or commit them to a result. Courts must guard against

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[566] Ristaino v. Ross, 424 U.S. 589, 596 n.8 (1976).

[567] *See* Spies v. Illinois, 123 U.S. 131, 176 (1887).

attempts to use voir dire to prejudice jurors with "guilt by association" questions. Courts and counsel may be fumbling in their efforts to discover bias. They may waste time, but the response must not be to restrict voir dire unduly. Examination of prospective jurors is an ancient right.[568] It helps assure parties they will receive a fair trial. It helps juries to understand the importance of entering the jury box with a willingness to judge a case fairly.

These are not judgments that lend themselves to simple rules.[569] Making these judgments—case-by-case, question-by-question—is not always easy, but there is no way to avoid it. This is an area that demands fine judgment, carefully exercised, and more than a little common sense.[570]

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[568] *See* Press-Enter. Co. v. Superior Court, 464 U.S. 501, 506–08 (1984).

[569] One commentator has admirably tried to reduce these complexities to a concise set of statements, but his reduction does not capture the variegated contexts in which these problems arise. *See* Spears, *supra* note 8. For example, his first proposed guideline ("Defining Content") does not cover the case in which the race or religion of a non-testifying victim or a lawyer in the case makes voir dire necessary. *See* LaRocca v. Gold, 662 F.2d. 144, 150 (2d. Cir. 1981). More important for the trial lawyer, it would require counsel to lay an evidentiary foundation before being permitted to probe in certain areas. While that may be appropriate in a quite extraordinary case, in the vast majority of cases, it threatens to prolong voir dire with detours into matters that can, almost always, be left to the sound discretion of the court. In addition, while his guidelines provide a useful statement of matters to be considered, they cannot be adopted as rules of law without changing significantly the way in which voir dire is constructed. Were they made law, there would undoubtedly be far more appeals based on inadequate voir dire. And the prospect of such an appeal would skew the behavior of trial counsel and judges. No doubt, judges—concerned about reversal on a peripheral matter—would allow far more voir dire, potentially bogging down cases in extended questioning of prospective jurors.